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In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL G. TYSON,
Petitioner,

v.

CLARENCE TRIGG,
Superintendent of the Indiana Youth Center; and
ATTORNEY GENERAL OF THE STATE OF INDIANA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the non-retroactivity doctrines of Teague v. Lane and its progeny foreclose consideration on collateral review of the constitutionality of a state system that granted the prosecutor the power to select the trial judge -- a question as to which there exists no direct precedent but the answer to which appears to be established by a long, unambiguous historical record.

II. Whether the sanction of defense witness preclusion can be imposed to bar important, non-cumulative testimony by eyewitnesses to relevant events for a discovery breach where the discovery obligation was unclear and arguably unconstitutional and where neither the defendant nor his attorneys acted in bad faith.

III. Whether the Brecht v. Abrahamson harmless error test applies where the state court did not find constitutional error in the exclusion of witnesses as a discovery sanction and therefore never conducted review under the Chapman harmless error standard or whether, in such circumstances, the Chapman harmless error standard applies.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 50 F.3d 436, and is reproduced in the Appendix at A-1. The decision of the United States District Court is reported at ___ F. Supp. ___, 1994 WL 797707 (S.D. Ind. Sept. 6, 1994). The decision of the Court of Appeals of Indiana is reported at 619 N.E.2d 276 (Ind. App. 1993), and is reproduced in the Appendix at A-36.

JURISDICTION OF THIS COURT

The decision and order of the United States Court of Appeals for the Seventh Circuit were filed on March 20, 1995. A petition for rehearing with suggestion for rehearing en banc was denied by order dated April 14, 1995. (A-34)

This court has jurisdiction to review the judgment of the United

States Court of Appeals for the Seventh Circuit by certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amdt. VI, provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, ...

U.S. Const., Amdt. XIV, provides, in relevant part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

STATEMENT OF FACTS

Following a trial before the Honorable Patricia J. Gifford and a jury, Petitioner Michael G. Tyson was convicted of rape and criminal deviate conduct arising out of events involving Desiree Washington that occurred in

Indianapolis, Indiana on the night of July 19-20, 1991. (R.104-05)[1] On March 26, 1992, Tyson was sentenced to a term of ten years, with four years of that sentence suspended. (R.5643-45) He was released from prison on March 25, 1995, and is presently serving his four year probationary term.

Judge Gifford, a former sex crimes prosecutor, presided over Tyson's trial and all pre-trial and post-trial proceedings in the case. She did so because Indiana law and local practice gave the prosecutor the ability to pick the trial judge from among six criminal court judges in the county. The prosecutor chose Judge Gifford. Defendant objected before trial to the judge selection system, inter alia, on

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[1] References preceded by "R." refer to the Record on Appeal that was prepared for the appeal to the Indiana Court of Appeals and that was before the United States District Court and the Court of Appeals in the habeas proceedings.

Fourteenth Amendment, due process grounds, but relief was denied. (R.356-63, 425) The hand-picked trial judge proceeded to make a series of idiosyncratic, pro-prosecution rulings that were upheld on appeal not because they were "correct," but because they were deemed to be within the trial court's broad discretion. See, e.g., A-52, A-98.

Tyson's trial, at which both he and Washington, the alleged victim, testified, was essentially a credibility contest. Although Tyson and Washington agreed on certain particulars of their sexual encounter, Washington testified that she did not consent to sex, and that she was forcibly raped. Tyson testified that their sexual relations were consensual. The case was a close one; the jury's

initial vote was six to six.[2]

The evidence at trial showed that Washington and Tyson were in Indianapolis for the city's Black Expo. Washington, who was competing for the Miss Black America title, met Tyson,

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[2] The case remained close through the appeals process. The three-judge panel of the Indiana Court of Appeals affirmed over a strong dissent. (A-36, 135) The Indiana Supreme Court denied review by a vote of two to two, Chief Justice Shepard having disqualified himself. Order of the Supreme Court of Indiana dated September 22, 1993 Denying Appellant's Petition to Transfer. The Chief Justice thereafter disclosed that he had disqualified himself because his wife, without identifying herself, had initiated a conversation with Petitioner's lead counsel, Alan M. Dershowitz, in which she had said that several Indiana lawyers had criticized an argument he had made for Tyson in the Indiana Court of Appeals in connection with an application for bail pending appeal. Although Dershowitz terminated the one-way conversation as soon as he learned who it was that was speaking to him, the Chief Justice ruled his recusal was necessary to avoid an appearance of impropriety inasmuch as his wife's comments to Tyson's attorney could have been construed as advice on how to handle the appeal. (Decision of Chief Justice Shepard dated October 15, 1993 explaining his recusal.)

the former heavyweight champion, at a rehearsal and made a date to see him that night. (R.3071)[3]

After 1:00 a.m., when Washington was already in bed at her hotel, Tyson called her from his limousine. Washington agreed to meet him downstairs. She testified at trial, as she had in the grand jury, that when she climbed into the back seat of the limousine, Tyson kissed her, that she jumped back, and that he did not touch or attempt to touch her any more in the limousine. (R.3114-16)

Tyson, however, testified, as he had testified in the grand jury, that

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[3] Several contestants testified that, after meeting Tyson, Washington commented on his wealth (R.4890), speculated on the size of his penis (R.5146-47), expressed the opinion that he lacked intelligence (R.4591, 4890-91), observed that his former wife had gotten a lot of money out of him (R.4591), and boasted that she, Washington, could have him too. (R.5147) Washington, however, denied having made any such comments. (R.3255-56)

Washington not only returned his initial kiss, but that the two of them kissed and had other physical contact on the short drive to his hotel. (R.5018-19) Washington willingly accompanied Tyson to his room at the Canterbury Hotel, but testified that she did not hold Tyson's hand as they entered the hotel. (R.3116)

Washington testified at trial that, after some conversation, Tyson forced himself on her, over her vocal objections. (R.3147) However, before the trial, Washington's accounts of what had happened were not so straightforward nor so unequivocal.[4]

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[4] There was testimony by a number of witnesses establishing that, upon returning to her hotel, and during the course of the day, Washington recounted a variety of inconsistent and discrepant versions of what had happened on her date with Tyson. She told her roommates that Tyson had tried to rape her. (R.3159, 3013) She told another contestant that she "thought" she had been raped (R.4896-97), and another that he "kind of, sort [of]" raped her. (R. 5179) She gave several

Tyson himself testified at trial, as he had in the grand jury, that Washington had willingly and enthusiastically engaged in sex with him, but had gotten annoyed when he declined her request that he walk her downstairs after it was over. (R.5022-26)

No other person witnessed what occurred between Washington and Tyson behind the closed doors of his hotel suite. Three disinterested women were present when Tyson and Washington arrived at Tyson's hotel, and witnessed their physical interactions with each other immediately before the events

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different accounts of where and how the claimed sexual assault took place. (R.4897-98, 5179, 5181-83, 5167, 4944, 3042) And, according to Reverend Cathryn Newlin, the chaplain in the hospital to which Washington went nearly 24 hours after the incident, Washington indicated that there had been some consensual physical contact with Tyson, some "participation" on her part, up to a point where she said no. (R.4396-98)

directly at issue. The trial judge refused to permit testimony by these three witnesses, who came forward only after the trial had begun because, in her view, the defense had not disclosed their existence to the State quickly enough.

Prior to trial, pursuant to the State's motion and Indiana's law on discovery, the trial court had entered discovery orders requiring Tyson to provide to the State by a specified date before trial, the names, addresses and statements of all witnesses he "intend[ed]" or expect[ed]" to call. (R.198, 494, 827) This was a continuing obligation through trial. (R.199, 201)

Shortly after the trial had begun, a witness came forward who said she had seen Tyson and his companion arriving at the Canterbury Hotel on the night in question. (R.1135-36) She, in turn,

identified two other women whom she was with who also witnessed the pair's arrival. The three women -- Carla J. Martin, Pamela Lawrence, and Renee Neal -- had information critical to the defense. (R.1140, 1189-93) Martin had seen Tyson and the young woman embracing and kissing in the limousine as they arrived at Tyson's hotel, and had commented on it to Lawrence (they "were all over each other"). (R.1190-92) Neal had seen the couple enter the hotel holding hands on their way to Tyson's room. (R.1192-93)[5] Their

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[5] According to the defendant's offer of proof, the three women would have testified that they had gone to the Canterbury Hotel to pick up a bag Martin had left there. (R.1189-90) Martin and Neal left Lawrence in the car and entered the hotel, Martin to retrieve her bag, Neal to make a phone call. (R.1190) Martin returned to the waiting car, and waited with Lawrence for Neal, who had not yet emerged from the hotel. (R.1190)

Martin saw a limousine arrive and saw, through its tinted side windows, a man and a woman hugging and kissing. (R.1190) She remarked to Lawrence that

testimony, if believed, would have corroborated Tyson's otherwise uncorroborated testimony that on the way to his hotel, immediately before the alleged crime, Washington had engaged in consensual physical contact with him, contact that she specifically denied in her sworn testimony.

The facts pertinent to the discovery sanction issue are as follows: Washington gave her direct testimony and began cross-examination on the first day of trial, Thursday, January 30, 1992. (R.3055, 3225) That day, Mark C. Webb, who was not a member

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the two people were "all over each other." (R.1190) She saw the couple emerge from the limousine, recognized Tyson, and noted that fact to Lawrence. (R.1190-91) Martin observed the woman move towards Tyson until their upper bodies appeared to be touching, and she appeared to put her arm in Tyson's. (R.1191) Lawrence would have confirmed Martin's account (R.1190-92), and Neal, who left the Canterbury as Tyson and his female companion entered, would have testified that the couple held hands as they entered the hotel. (R.1192-93)

of the trial team but an associate at the law firm of Tyson's local counsel, received a telephone call from a secretary at Black Expo, who told him that one Carla Martin had called and indicated that she had information regarding the Tyson case. The nature of the information was not disclosed. (R.1136, 1162, 4159-60)

Although Martin may have been just another in a long line of crank callers trying to elbow in on the notoriety of this case (R.1136-37, 4166-67, 4175, 4196-97), Webb promptly followed up. He was not able to reach Martin until noontime on Friday, January 31, by which time Washington had finished testifying. (R.1163, 1195) At that time, Webb and Martin had a brief conversation about what Martin had seen, and Webb learned that Martin had been in the company of Lawrence and Neal. (R.1163) Around 6:00 p.m., on

Friday, January 31, after the day's trial proceedings had ended, Webb interviewed Martin and Lawrence. (R.1163) Following that interview, he advised Tyson's local counsel, James Voyles, and one of the out of state trial attorneys of what he had been told. (R.1163, 1196) Knowing that the limousine had tinted windows and thus skeptical as to whether the witnesses could have seen what they claimed to have seen, counsel promptly moved for leave to inspect the vehicle. They also decided that they needed to interview the witnesses personally, and asked Webb to arrange it. (R.1163, 4171-73)

Trial resumed on Saturday, February 1. (R.3520) In the morning, an airlines agent testified about Tyson's departure from Indianapolis, (R.3539-44), followed by the driver of Tyson's limousine, Virginia Foster.

(R.3545) She testified, as she had before the trial, that she did not see what Tyson and Washington did in the back seat. (R.3661, Deposition of Virginia Foster, Jan. 10, 1992 at 148) Two medical witnesses testified in the afternoon. (R.3683, 3686-761, 3762-848) That day, the trial court granted the motion for inspection (R.1134), the limousine was produced that evening, and counsel determined that the witnesses could easily have seen occupants in the back seat. (R.1164, 4172)

Meanwhile, Webb succeeded in contacting Martin who agreed to meet Voyles the next day, Sunday, February 2, after church. At that time, Voyles, and two other members of the defense team, interviewed Martin and Lawrence separately and concluded that they appeared to be telling the truth. Voyles <u>immediately</u> called the

prosecutor -- on Sunday -- with their names, addresses, the phone numbers and a summary of their information. (R.1164) Later that Sunday afternoon, Voyles reached the third witness, Neal, by phone, and, after speaking with her, promptly provided her name to the State. (R.1164)

On Monday morning, the defense filed with the Court a motion to add the three witnesses to its witness list, with an offer of proof. (R.1135-40; see also R.4157-58) The State itself interviewed the witnesses at length. (R.4165)

The next day, although the State had not even rested, the State objected to the jury hearing the witnesses. The prosecutor conceded that the information provided by the new witnesses was "pivotal" (R.4192), and acknowledged that "[w]e can have little dispute with regard to what the

testimony, if believed, could have in terms of an impact on [this] jury." (R.4186) The State argued, however, that new witnesses would be "awkward" and would interfere with the "rhythm" it had attempted to build and, therefore, that they should be excluded. (R.4182)

Without holding any evidentiary hearing, without specifying what discovery breach had been committed, and over defendant's objection that preclusion of these critical witnesses would violate his constitutional rights under Taylor v. Illinois, 484 U.S. 400 (1988), the trial judge barred the witnesses as a discovery sanction. She did so even though she found unequivocally that the defense had not acted intentionally, purposefully, or in bad faith. (R.4202, 4205, 4206)

On August 6, 1993, by a vote of two to one, the Indiana Court of

Appeals affirmed the conviction. Tyson v. State, 619 N.E.2d 276 (Ind. App. 1993), reproduced at A-36. Judge Sullivan dissented, concluding that his "review of the entire record in the cause leads me to the inescapable conclusion that [Tyson] did not receive the requisite fairness which is essential to our system of criminal justice." (A-137) All three state court judges agreed that Tyson was convicted under a judicial selection system that is "totally inappropriate and must be abandoned" (A-131) because it "lacks the appearance of impartiality that is required to maintain the confidence of the public and the accused in the system." (A-132) Nevertheless, the court concluded that Tyson had "failed to demonstrate that he was denied due process of law." (A-131, 137, n.34)

The majority upheld the preclusion

of the defense witnesses, holding that the trial judge had not abused her discretion in concluding that the defense had not acted promptly enough in notifying the State of the witnesses' existence and deferring to the trial judge's discretion as to the appropriate sanction. (A-52, 59, 79) No mention was made of the defendant's constitutional right to present witnesses in his favor, or of Taylor v. Illinois, upon which Tyson expressly relied. (Brief to Court of Appeals at 29-31) Justice Sullivan dissented, finding that "[w]ithout question there was error in excluding the testimony of Ms. Martin, Ms. Neal and Ms. Lawrence" and "without question that error was not harmless beyond a reasonable doubt." (A-159)

On September 22, 1993, the Supreme Court of Indiana denied review by a vote of two to two. (Order of the

Supreme Court of Indiana Denying Appellant's Petition to Transfer.) On March 7, 1994, this Court denied certiorari. Tyson v. Indiana, 114 S.Ct. 1216 (1994).

Tyson thereafter petitioned the United States District Court for the Southern District of Indiana for a writ of habeas corpus, claiming, inter alia, that his constitutional rights were violated by the prosecutor's selection of the judge and by the exclusion of the three defense witnesses.

The District Court denied relief. Tyson v. Trigg, __F.Supp.__, 1994 WL 797707 (S.D. Ind. 1994). Although Tyson's claim was that giving the prosecution the power to pick the judge gave the State a substantial and unfair advantage, the district court analyzed the judge selection issue as if it were an "appearance of impropriety" claim and held that the "appearance of

impropriety" did not constitute a due process violation. __ F. Supp. at __, 1994 WL 797707, *3.

The District Court did not even attempt to justify the preclusion of the three witnesses as a discovery sanction, virtually acknowledging that the trial court had committed constitutional error. Nevertheless, in the District Court's view, the error was harmless under the standard enunciated in Brecht v. Abrahmson, 113 S.Ct. 1710 (1993). __ F. Supp. at ___, 1994 WL 797707, *5.

The Court of Appeals for the Seventh Circuit affirmed. (A-1) It too evaded the judge selection issue, not, as the district court had done, by treating it as an appearance-of-impropriety claim, but by manufacturing an erroneous factual premise. See A-3-10. The Court of Appeals began with the factually incorrect proposition

that, under Indiana procedures, selection of the trial judge was merely an automatic, unavoidable by-product of the prosecutor's decision to proceed by grand jury indictment, rather than by information.[6] (A-3-6) Then it

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[6] Though the record unambiguously showed otherwise, Judge Posner posited that at any point in time, each of the six judges in the county supervised a grand jury, that a prosecutor who wished to proceed by indictment had to choose one of those grand juries, and that the judge who had empaneled that grand jury would receive any indictment it returned. (A-3)

In fact, the regular grand jury rotated among the six judges (R.5672-73), but that is largely beside the point. Tyson's case did not go to a regular grand jury.

In Tyson's case, the prosection opted to use a "special grand jury." A special grand jury, used, as its name suggests, only in extraordinary cases, comes into existence when the prosecutor asks a judge, whom he selects, to empanel one. The judge, whom the State has selected, then handles the case that the special grand jury acts upon. Thus, it is by choosing to use a "special grand jury" (and only by choosing to use a special grand jury) that the State gets to pick the trial judge from the six sitting judges in the county. (R.5669-91)

reasoned that the defendant had not challenged the prosecutor's power to choose between indictment or information, a prosecutorial prerogative the constitutionality of which has long been assumed and which, in any event, had never been challenged in any reported cases. (A-7-10) Finally, the Court reasoned, were the practice to be held unconstitutional, that holding would constitute a new rule, and thus it would not be an available ground for habeas corpus relief. (A-6) In this way, the Court of Appeals avoided ruling on the substantive constitutional question -- whether due process is violated when the prosecutor is granted the advantage of picking the trial judge.

The majority of the Court of Appeals termed the issue of witness exclusion the "most difficult" issue (A-11), but decided it against Tyson

too. It recognized the split in the Circuits as to whether witness preclusion is an available discovery sanction where, as in his case, the discovery violation was neither deliberate, nor done in bad faith (A-15-16), but held that witness preclusion was a permissible sanction even for some non-willful violations of discovery rules. (A-16) The majority, however, equivocated as to whether exclusion of Tyson's witnesses violated his Sixth Amendment rights under Taylor v. Illinois, and ultimately declined to answer that question. (A-18-19) Instead, it ruled that, even if the exclusion was constitutional error, Tyson would not be entitled to relief. Recognizing a split in the Circuits on the question of which standard of review applied where the state courts had conducted no harmless error review of their own (A-19), the Court of

Appeals held that Brecht harmless error analysis applied, rather than, as defendant argued, the more stringent harmless error test of Chapman v. California, 386 U.S. 18 (1967). (A-19) And, according to the Court of Appeals, Tyson "flunk[ed]" the Brecht test. (A-19)

Judge Flaum, concurring, unequivocally concluded that the exclusion of his witnesses had violated Tyson's Sixth Amendment rights. (A-24) He, too, however, concluded that, under the Brecht standard, the error was harmless. (A-30-32)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE NON-RETROACTIVITY DOCTRINES OF TEAGUE V. LANE AND ITS PROGENY FORECLOSE CONSIDERATION ON COLLATERAL REVIEW OF A CONSTITUTIONAL QUESTION AS TO WHICH THERE EXISTS NO PRECEDENT ON ALL FOURS, BUT THE ANSWER TO WHICH IS ESTABLISHED BY A LONG, UNAMBIGUOUS HISTORICAL RECORD

This case presents the question whether the federal courts are barred,

on collateral review of a state conviction, from considering a constitutional question as to which there is no precedent directly on point, even though the answer to the constitutional question appears to be established by a long, unambiguous historical record. This Court's "new rule" cases, though numerous, provide no clear answer to that question.

The substantive question is whether Petitioner's right to due process and to a fair trial were violated by a peculiar and highly unusual state law practice that conferred on the prosecutor a significant procedural advantage[7] --

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[7] It can hardly be disputed that the power to pick the presiding judge is a significant procedural advantage, because all judges are not the same. As then Justice Rehnquist noted in his memorandum opinion on recusal in Laird v. Tatum, 409 U.S. 824, 834-35 (1972):

"Judges are not fungible; they cover the constitutional

the power to pick the judge who would handle Petitioner's case. No doubt because the practice is so rare (itself, perhaps, a function of its obvious unfairness), there exists no body of case law, in Indiana or elsewhere, approving or disapproving it.[8]

> spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community." (quoting Justice Douglas in Chandler v. Judicial Council, 398 U.S. 74, 137 (1970)).

[8] Apparently only Louisiana has had occasion to review this type of judicial selection procedure. Its Supreme Court has characterized the prosecutorial selection of trial judges as "facially unfair" and a violation of due process. State v. Simpson, 551

The Seventh Circuit ruled in essence that the absence of reported challenges to Indiana's peculiar judge selection procedures and the concomitant absence of judicial precedents condemning it, meant that Petitioner's challenge, even if well-founded, would call for establishment of "new rule" within the meaning of Teague v. Lane, 489 U.S. 288 (1989). Yet it seems perverse in the extreme to characterize as a "new rule" a proposition that seems so firmly entrenched in American jurisprudence that the courts have not even had occasion to consider it. Likewise, it seems highly unlikely that this Court intended to fashion a jurisprudence of

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So.2d 1303, 1304 (La. 1989) Just recently, that Court held that a criminal defendant is entitled to a random allotment of his case, and does not have to show actual manipulation of the system by the prosecutor. State v. Reed, 1995 WL 251981 (La. Apr. 28, 1995).

habeas corpus that insulates from review via collateral proceedings the most egregiously offensive state practices, simply because their very egregiousness renders them rare.

Petitioner respectfully submits that this is not what Teague or its progeny mean. Teague addresses the situation where a Petitioner, on collateral review, relies on a new case, that is, a case decided after his conviction becomes final. This Court has held that, subject to two exceptions,

> a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless [that] decision was dictated by precedent existing when the judgment in question became final.

Stringer v. Black, 503 U.S. 222, 227 (1992).

As this Court has explained, Teague balances the interest in

ensuring that state trials are conducted in a constitutional manner against interests of comity and finality. It advances those latter interests by ensuring "that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 497 U.S. 227, 234 (1990). The principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler v. McKellar, 494 U.S. 407, 414 (1990).

In the instant case, however, Petitioner did not invoke a recent decision as the basis for his claim, nor did the state courts rely either reasonably or unreasonably on any body of law even arguably validating the Marion County judge selection

procedure.[9] The reasons underlying Teague's non-retroactivity doctrines have no obvious applicability in such a case.

Yet there is language in Teague, and its progeny suggesting that the non-retroactivity doctrines have a broad reach and that, unless the rule the Petitioner advances is "dictated by [existing] precedent," e.g., Goeke v. Branch, 115 S.Ct. 1275, 1277 (1995); Caspari v. Bohlen, 114 S.Ct. 948, 953 (1994); Gilmore v. Taylor, 113 S.Ct. 2112, 2116 (1993); Butler, 494 U.S. at

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[9] The type of inequitable system in place in Marion County has never been judicially approved, in Indiana or elsewhere. Moreover, neither the State of Indiana nor any court has shown nor even suggested that a ruling invalidating that system, and reversing a conviction obtained pursuant to it, would conflict with any existing precedent, "break[ ] new ground," or "impose[ ] a new obligation on the States or the Federal Government."; Graham v. Collins, 113 S.Ct. 892, 897 (1993); Butler, 494 U.S. at 412; Penry v. Lynaugh, 492 U.S. 302, 314 (1989); Saffle v. Parks, 494 U.S. 484, 487 (1990).

412; Teague, 489 U.S. at 301, it cannot serve as a basis for collateral relief. In other words, an absence of judicial precedent condemns Petitioner's claim to failure no matter how obvious or irrefragable the proposition he urges appears to be. Yet, such a reading of Teague does nothing to further the interests Teague purports to protect. And the notion that a rule is nevertheless "new" within the meaning of Teague where its existence and validity have long been assumed is hardly self-evident.

History confirms that the "rule" that Tyson seeks is anything but new. An independent and impartial judiciary has long been considered the cornerstone of fair legal process. Apparently as early as the sixteenth century, the need for judges to be independent from the will of the King was recognized. M.J.C. Vile,

Constitutionalism And The Separation of Powers 30 (1967). Well before the Revolution, influential political philosophers were arguing for an independent judiciary.[10] The writings of Alexander Hamilton, John Adams, Thomas Paine, and Benjamin Franklin reaffirm this view.[11] And while the

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[10] Montesquieu proclaimed, "there is no liberty if the judiciary power be not separated from the legislative and executive." 11 Charles Louis De Secondat, Baron Montesquieu, Spirit Of The Law, c. 6, ¶5 (1748).

[11] See, e.g., Alexander Hamilton, Federalist Paper, No. 78 ("the complete independence of the courts of justice is peculiarly essential in a limited Constitution"); John Adams, Thoughts on Government Applicable to the Present State of the American Colonies, in 4 The Works of John Adams, at 198 (Books for Libraries Press 1969) ("The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both"); Thomas Paine, Public Letter to the People of Philadelphia, in The Complete Writings of Thomas Paine, at 1005 (Citadel Press 1945) ("[T]he judge, before whom a man

federal requirement of separation of powers is not applicable to the states, the historical record establishes a longstanding recognition that fairness cannot be achieved if judges are beholden to the executive, and that liberty depends on judicial independence. Thus, Tyson's claim does not involve "gradual developments in the law over which reasonable jurists may disagree." Sawyer, 497 U.S. at 234. It involves fundamental principles of fairness over which there has never been any real disagreement.

Furthermore, even if it could be said that Tyson was seeking a "new rule," his claim appears to fall within one of the two exceptions recognized in Teague. Under Teague's second

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was to be tried, should not be dependent for the tenure of his office on the will of the prosecutor"); Benjamin Franklin, Letter to His Son, March 22, 1775 in 5 The Works of Benjamin Franklin (Hilliard, Gray and Co. 1837).

exception, "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are "implicit in the concept of ordered liberty."'" Teague, 489 U.S. at 307 (plurality opinion), quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The Court has noted that this exception, while a narrow one, applies to "new rules" that "not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Sawyer, 497 U.S. at 242, quoting Mackey, 401 U.S. at 693 (emphasis in original). See also Saffle v. Parks, 494 U.S. 484, 495 (1990) (exception is for "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding'").

An independent judiciary -- and a judge who has not been hand-picked by the prosecutor -- are essential to both accurate factfinding and to our bedrock understanding of what is fair. As Justice Scalia has posited, due process "demands" an independent judiciary. See Weiss v. United States, 114 S.Ct. 752, 771 (1994) (Scalia, J. concurring).

Thus, certiorari should be granted to consider the three important, related questions: whether the new rule doctrine has any application when the Petitioner does not invoke a new decision in support of his claim and the state courts have relied on no body of law in rejecting that claim; whether a rule can be deemed "new" where history shows it has long been assumed to operate; and whether entitlement to a judge not chosen by the prosecution is implicit in the concept of ordered

liberty, and thus, cognizable on habeas even if it is deemed a new rule.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A DEFENDANT'S RIGHTS UNDER THE SIXTH AMENDMENT AND UNDER TAYLOR V. ILLINOIS ARE VIOLATED WHEN "PIVOTAL" DEFENSE WITNESSES ARE PRECLUDED BASED ON A NONWILLFUL BREACH OF AN UNCLEAR AND ARGUABLY UNCONSTITUTIONAL DISCOVERY OBLIGATION WHERE THE DELAY IN DISCLOSURE DID NOT PREJUDICE THE STATE IN ANY SIGNIFICANT WAY

In this case, a trial judge -- as a discovery sanction -- precluded testimony by three disinterested defense witnesses even though the discovery obligation the defense was deemed to have violated was unclear and, even though, as the trial court itself found, the violation was not willful, deliberate, or in bad faith. The exclusion resulted in keeping from the jury information that the prosecutor conceded would be

"pivotal."[12] And it occurred where the only prejudice the State could identify was some feared interference with the "rhythm" of the case it was attempting to present. The preclusion sanction was imposed (and upheld by the Indiana Court of Appeals) without even a mention of Taylor v. Illinois, 484 U.S. 400 (1988), which establishes that the Sixth Amendment's Compulsory Process Claim guarantees a defendant the right to present witnesses in his defense, and delimits the circumstances under which witness preclusion can be utilized as a discovery sanction. And it was imposed (and upheld) without any mention of the adversary system's dependence on "full presentation of the

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[12] On appeal, the State's attorney again conceded the importance of the excluded testimony, acknowledging that the excluded witnesses "clearly would have been telling a story wholly different than the story we had." (A-148, emphasis added)

facts, within the framework of the rules of evidence." United States v. Nixon, 418 U.S. 683, 709 (1974).

This case thus presents several important and recurring questions involving discovery and discovery sanctions in criminal cases, subjects this Court has not recently addressed.

Taylor recognized that witness preclusion is an extreme sanction that implicates important constitutional rights. 484 U.S. at 409, 417 & n.23. While the Taylor Court did not announce any hard and fast rule governing when the sanction may be imposed, it emphasized that it was affirming use of the sanction in that case because the trial court had found that the "discovery violation was both willful and blatant" and was designed to obtain a "tactical advantage." Id. at 417. That Taylor did not authorize witness preclusion for every trivial or

unintentional violation of a discovery order was confirmed in Michigan v. Lucas, 500 U.S. 145 (1991), where the Court explained that Taylor "did not hold ... that preclusion is permissible every time a discovery rule is violated." Id. at 152.

For resolving specific cases, as one federal court candidly put it, Taylor gives "little guidance for determining whether the preclusion sanction is permissible." United States v. Alexander, 869 F.2d 808, 812 (5th Cir. 1989), cert. denied, 493 U.S. 1069 (1990). See also Comment, "Preclusion: Procedural Efficiency and the Right to Defend," 27 Hous. L. Rev. 327, 335 (1990) (criticizing Court's failure to articulate workable standards). Because "few rights are more fundamental than that of an accused to present witnesses in his own defense, " Chambers v. Mississippi, 410

U.S. 284, 302 (1973), the lack of clarity, which this Court alone can remedy, should be permitted to continue no longer.

Much of the uncertainty could be eliminated if this Court would decide whether witness preclusion must be reserved for cases in which the discovery violation was willful or in bad faith. The federal circuits are split on the question. See, e.g., Bowling v. Vose, 3 F.3d 559 (1st Cir. 1993), cert. denied, 114 S.Ct. 1236 (1994) (since no finding of misconduct, constitutional violation to exclude witnesses); United States v. Peters, 937 F.2d 1422, 1426 (9th Cir. 1991) (absent a "willful and blatant" discovery violation, exclusionary sanction is impermissible); Grooms v. Solem, 923 F.2d 88, 91 (8th Cir. 1991) (counsel failed to raise alibi after notice period expired believing it was

too late; habeas granted for ineffective assistance of counsel since preclusion would not have been permissible unless delay was willful); Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988) (preclusion appropriate only if violation was willful; the "absence of a good excuse" is not sufficient); but see United States v. Cervone, 907 F.2d 332, 345-46 (2d Cir. 1990), cert. denied, 498 U.S. 1028 (1991) (upholding exclusion of expert testimony for violation of Rule 12.2 where no bad faith shown); United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992) (rejecting bad faith as absolute condition to exclusion, but remanding for district court to exercise its discretion under Taylor expressly).

The grant of certiorari would also be particularly appropriate in this case because there exists a serious question as to whether any sanctionable

discovery violation occurred. The discovery obligation was itself unclear, and if it was breached at all, the "breach" involved a close judgment call and an "unjustified delay" of a matter of hours, not days or weeks. After all, the discovery orders placed on the defense an obligation to disclose witnesses it "intended" or "expected" to call.[13] Yet neither the trial judge nor the majority of the State appeals court found that any person associated with the defense intended to call any of the three

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[13] The orders at issue entered in the State's motion applied only to the defense. Notably, in Indiana, discovery rules are not applied evenhandedly. When the State has committed a discovery violation, witness preclusion is available as a sanction only when the violation was deliberate. See Phillips v. State, 550 N.E.2d 1290, 1300 (Ind. 1990)("exclusion of evidence is not proper absent a 'showing that the prosecution engaged in deliberate or other reprehensible conduct which thwarted the defendant's right to a fair trial.")

witnesses until the limousine was examined (on Saturday evening) and until the witnesses had been interviewed and their credibility had been assessed (on Sunday afternoon). At that point, the prosecutor was immediately advised. (R.1164) Thus, as the dissenting judge correctly concluded, "Not only was there no discovery order breach, there was no delay, substantial or otherwise." (A-144)

The majority of the Indiana Court of Appeals created a discovery "wrong" only by creating a new -- and arguably unconstitutional -- discovery obligation: a continuing duty to disclose "potential witnesses as soon as reasonably possible." (A-49, emphasis added) According to the majority, the defense breached that obligation by not disclosing the witnesses as soon as Webb had spoken to

two of them late Friday.

There is, however, an enormous difference between a "potential" witness and a witness whom the lawyer "intends" to call, and that difference is itself constitutionally significant. A potential witness is anyone who knows facts that may be relevant; an intended witness is one whose testimony is expected to help the defendant prevail. Placing an obligation on the defendant to disclose "potential" witnesses itself raises substantial constitutional questions since this Court has suggested that the obligation to disclose witnesses the defendant intends to call represents the outer limits of constitutionally permissible discovery from a defendant in a criminal case. See Williams v. Florida, 399 U.S. 78 (1970) (upholding notice-of-alibi rule on ground that it only accelerated the disclosure of

information that the defense had already determined it would use at trial).[14]

The excluded evidence was important, the case was close, and there was no significant prejudice to the State attributable to any discovery breach or delay.[15] If defense witness

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[14] As the dissent perceived, if the majority's analysis were correct, defense counsel would be required to disclose witnesses even before a determination has been made about whether their testimony would be harmful to the defendant, plainly a violation of defense counsel's constitutional and ethical obligations to his client. See, e.g., Strickland v. Washington, 466 U.S. 668, 691 (1984); ABA Standards Relating To The Administration Of Criminal Justice: The Defense Functions, §4-4.1 (2d ed. 1980).

[15] By Friday afternoon, Washington had already finished testifying. By Monday, the State had questioned the three witnesses. (R.4165) A brief continuance could have been granted to enable the State to depose them, if it believed depositions were necessary. Moreover, since the State had not yet rested, it could have been granted leave to recall any prior witnesses to question them about this newly discovered information. In fact, the only

preclusion is permissible in these circumstances, and in the absence of willfulness, then, perhaps, Taylor should simply be overruled in honest recognition of the fact that the Sixth Amendment does not impose any real limits on the power of the courts to enforce discovery rules through the sanction of witness preclusion.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING WHICH HARMLESS ERROR STANDARD APPLIES IN FEDERAL HABEAS CORPUS REVIEW OF STATE CONVICTIONS WHERE THE STATE COURTS HAVE CONDUCTED NO HARMLESS ERROR ANALYSIS AT ALL

In Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), this Court held that, for constitutional errors of the trial

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prejudice the State was able to assert was to the so-called "rhythm" of its case. (R.4182) As the dissenting state judge again correctly concluded, any "arguable inconvenience to the prosecution does not justify preventing the defense from presenting relevant evidence which might have tipped the balance in light of the reasonable doubt standard governing the jury." (A-147, emphasis added)

type, the standard to be used in determining whether a state court conviction must be set aside in a habeas corpus proceeding is the Kotteakos standard:[16] whether the error had substantial and injurious effect on or influence in determining the jury's verdict, rather than whether the error was harmless beyond a reasonable doubt, the standard under Chapman v. California, 386 U.S. 18 (1967).

The majority reasoned that the less onerous Kotteakos standard promotes the considerations underlying the Court's habeas jurisprudence. These include interest in the finality of convictions that have survived direct review, and considerations of comity and federalism, which counsel against unnecessary intrusions into

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[16] Kotteakos v. United States, 328 U.S. 750 (1946).

state criminal trials where states have made good faith attempts to honor constitutional rights.

Where, as in the Brecht case, the state courts, on direct review, had assessed the constitutional error under Chapman's stringent harmless error standard, this Court ruled that there was no reason for the federal habeas corpus courts to conduct the same review:

> We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-Miranda silence in this case requires reversal of his conviction. Each court that has reviewed the record has disagreed with the court before it as to whether the State's Doyle error was "harmless." State courts are fully qualified to identify constitutional error and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. See Rushen v. Spain, 464 U.S. 114, 120, 104 S.Ct. 453, 456, 78 L.Ed 2d 267 (1983) (per curiam). For these reasons, it scarcely seems logical to require federal habeas corpus

courts to engage in the identical approach to harmless error review that Chapman requires state courts to engage in on direct review.

Brecht did not address what standard applies when the state courts have not conducted harmless error review under the Chapman standard, either because they failed to recognize that constitutional error had occurred, because they misapprehended the harmless error standard applicable to constitutional claims on direct review, or because, as here, the state appeals courts simply ignored the constitutional claim.

The Circuits are divided on this issue. The Court of Appeals for the Eighth Circuit has held that the Chapman harmless error standard applies on habeas review, if the state courts have never reviewed the error. Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), cert. denied, 114

S.Ct. 1631 (1994); Starr v. Lockhart, 23 F.3d 1280 (8th Cir.), cert. denied, 115 S.Ct. 499 (1994) (Chapman, not Brecht, standard applies where the state court found there was no constitutional error). See also Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn. 1994) (following Orndorff).

The Seventh Circuit, in this case, held that Brecht applies even though the state courts had never evaluated the error under Chapman (and, indeed, had declined to even acknowledge defendant's constitutional claim). The Fourth Circuit has adopted the same rule, and the Eleventh Circuit has as well, albeit over a dissent. See Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 115 S.Ct. 129 (1994); Horsley v. Alabama, 45 F.3d 1486, 1492, n.11 (11th Cir. 1995); 45 F.3d 1498, n.3 (Hatchett, J., dissenting).

Ultimately, this Court will have

to resolve the conflict in the Circuits. To do so, the Court must revisit the function and nature of habeas corpus and decide whether finality is itself the primary interest recognized in Brecht or whether it is comity -- which comes into play only if there actually exists a state court judgment to which a federal court can defer. See J. Blume & S. Garvey, "Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson," 35 Wm. & Mary L. Rev. 163, 183-84 (1993).

Now is the right time to do so. This is not a case where "experimentation" and experience would be useful to the Court and would permit this Court to better answer the question. The applicable principles and competing interests have been identified; the only question is precisely how the balance will be

struck.[17]

This is a particularly appropriate case in which to resolve the issue because which standard applies will almost certainly be determinative. The majority of the Indiana Court of Appeals, having found no error under state law in the exclusion of the witnesses (and having failed even to note the constitutional claim), conducted no "harmlessness" evaluation at all. The four federal judges who have evaluated the impact of the exclusion all did so, expressly, under

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[17] The uncertainty in the law serves no valid purpose, and insures either that some habeas petitioners who should not win relief will win relief or that some habeas petitioners who deserve relief will not get it. Further, until the question is resolved by this Court, overburdened but cautious federal judges will feel compelled to do double work, analyzing errors under both harmless error standards.

the Brecht-Kotteakos standard.[18]

In contrast, the single judge who did consider the witness exclusion under the Chapman harmless error test (and did so from the theoretically superior vantage point of a state judge) concluded that "[w]ithout question, [the] error was not harmless beyond a reasonable doubt." (A-159)

That evaluation seems indisputable. The excluded evidence -- testimony which would have come from three credible, disinterested witnesses -- contradicted specific testimony given by the complainant, corroborated otherwise uncorroborated testimony given by the defendant himself, and did so on the subject of Washington's

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[18] Not a single judge who has considered this case has even intimated that his or her conclusion would have been the same if the more onerous Chapman standard had applied, although the Petitioner argued that Chapman provided the applicable standard in this case.

consensual intimacies with the defendant moments before the bedroom door closed and the events at issue occurred.[19]

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[19] The notion that what occurred in the limousine was of little significance because, in the words of Judge Posner, "[f]or a woman to kiss (or allow herself to be kissed by) a man in a limousine, and to hold hands with him while walking into a hotel, may be imprudent, ... but they are not ... tokens of consent to sexual intercourse" (A-20) misses the point. What happened on the way to Tyson's hotel room is important not because it constituted consent that could not later be withdrawn. Obviously, even express, actual consent can be retracted at any time until the acts at issue have occurred. But in deciding whether there was consent in the hotel room, as Tyson testified, or whether there was not consent, as Washington maintained, the jury could properly have considered it relevant that Washington willingly and enthusiastically engaged in intimacies a few minutes earlier. See, e.g., State v. Colbath, 130 N.H. 316, 325, 540 A.2d 1212, 1217 (1988) (Souter, J.) (the "sexual activities of a complainant immediately prior to an alleged rape may well be subject to a defendant's constitutional right to present evidence;" thus, notwithstanding state rape shield statute trial court was compelled to recognize "defendant's interest in presenting probably crucial evidence of the complaint's behavior closely preceding the alleged rape").

Under any meaningful harmless error test -- and certainly under the Chapman standard -- the exclusion of the witnesses in this close case could not properly be considered harmless. Cf. O'Neil v. McAninch, 1995 WL 66598 (U.S. S.Ct. Feb. 21, 1995) (when a federal habeas court finds a constitutional error and is in grave doubt about whether the error had a substantial and injurious effect or influence in determining the jury's verdict, the error is not harmless, and the petitioner must win). The factual record is complete. The legal issues were timely, properly and fully presented. The error at issue affected the reliability of the trial outcome in a case where the proof was far from overwhelming and the defendant has always maintained his innocence. The case thus presents an ideal vehicle for resolution of the issue.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that his Petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: June 8, 1995

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-3359

MICHAEL G. TYSON,

Petitioner-Appellant,

v.

CLARENCE TRIGG, Superintendent of the Indiana Youth Center; and ATTORNEY GENERAL OF THE STATE OF INDIANA,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP94-591-C—Sarah Evans Barker, *Chief Judge.*

ARGUED JANUARY 20, 1995—DECIDED MARCH 20, 1995

Before POSNER, *Chief Judge,* FLAUM, *Circuit Judge,* and MCDADE, *District Judge.**

POSNER, *Chief Judge.* Michael Tyson was convicted in 1992 in an Indiana state court, after a jury trial that lasted fifteen days, of the rape of W____. He was sentenced to ten years in prison, of which four were suspended. The Indiana court of appeals affirmed his conviction and sentence, *Tyson v. State,* 619 N.E.2d 276 (Ind.

* Hon. Joe Billy McDade of the Central District of Illinois, sitting by designation.

App. 1993), and both the Supreme Court of Indiana and the U.S. Supreme Court turned down his requests for a further appeal. He then filed a petition in federal district court for a writ of habeas corpus, and he appeals to us from the denial of the petition.

Tyson had one appeal from his conviction. Federal habeas corpus does not entitle him to another. A federal court may intervene in the state criminal process, nullifying a defendant's conviction and sentence and forcing the state to try him anew (or else simply let him go), only if the state criminal proceeding was vitiated by an infringement of one or more of a limited subset of the defendant's federal rights. If required to substitute our judgment for that of the Indiana court of appeals, we might come to a different conclusion from that court. But we are not authorized to conceive of our job in that way. We are not to offer a further tier of appellate review. We are to determine only whether Tyson was deprived of any of his federal rights that can be enforced in a federal habeas corpus proceeding.

He claims to have been deprived of three such rights. The first is a right to be tried by a judge selected to preside by an impartial process. Tyson claims that the prosecutor picked the judge who tried him (more precisely, who presided at the trial, for it was a jury trial rather than a bench trial)—picked a judge who had been a sex-crimes prosecutor in the same office—and that to allow the branch of government that prosecutes to determine which judge shall preside over which criminal cases is an elementary denial of due process of law.

It is true that the prosecutor picked the judge in Tyson's case, Judge Gifford, and that she is a former prosecutor of sex crimes. It is also true that the right to an impartial judge is a right of whose deprivation a state prisoner may complain in a federal habeas corpus proceeding. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1379 (7th Cir. 1994) (en

banc); *Fero v. Kerby*, 39 F.3d 1462, 1478-80 (10th Cir. 1994). And it is true, or at least we may assume it to be true for purposes of this appeal, that if Congress were to pass a law which provided that the U.S. Attorney in each district shall designate the federal district judge to preside in criminal cases, or even that the Environmental Protection Agency shall designate the federal district judge to preside in civil cases under the Clean Air Act, the law would raise profound issues under the due process clause. The question is whether it follows from all this that Tyson is entitled to a new trial.

A prosecutor in Indiana who wants to charge someone with a crime either can ask a grand jury to return an indictment or can file an information without bothering with a grand jury. (An information is much like a complaint in an ordinary civil case, only more detailed, Ind. Code § 35-34-1-2(a); *State v. King*, 502 N.E.2d 1366 (Ind. App. 1987).) When Tyson's prosecution began, there were six judges in the criminal division of the Marion County (Indianapolis) superior court. Each, in addition to his or her other duties, presided over a separate grand jury and over the trial of any cases arising from the indictments returned by that grand jury. If the prosecutor's office decided to proceed by way of indictment rather than information, it chose one of the grand juries to ask to return the indictment—and by choosing the grand jury it automatically chose the judge to preside at trial. The Marion County prosecutor's office decided to proceed by indictment in Tyson's case. It submitted its request for the indictment to Judge Gifford's grand jury, and by doing so selected her to preside at trial.

This procedure (since abandoned, as we are about to see) was apparently limited to Marion County, but that is Indiana's most populous. We have not been told how long it had been in effect when Tyson's case arose, but apparently it was not a recent innovation or a secret one. Yet no other criminal defendant had ever thought to challenge its legality. The Indiana court of appeals, while rejecting Tyson's argument that the procedure had deprived him

of his rights, criticized it as "totally inappropriate" because it made the criminal division of the Marion County superior court lack "the appearance of impartiality that is required to maintain the confidence of the public and the accused in the system." 619 N.E.2d at 300. The procedure was abandoned after this criticism, and the prosecutor no longer has any say in criminal trial assignments.

Although displeased with some of Judge Gifford's rulings at trial, Tyson does not claim that she was prejudiced against him, either because he was being tried for a sex crime or for any other reason. Even the dissenting judge in the Indiana court of appeals agreed that "Judge Gifford acted with complete and unswerving judicial integrity and impartiality." *Id.* at 301 n. 34. Nor does Tyson argue that the maintenance of a system of judicial selection deficient in "the appearance of impartiality" is a denial of due process. Such an argument is foreclosed in this circuit by *Del Vecchio v. Illinois Dept. of Corrections*, *supra*, 31 F.3d at 1370-79; see also *id.* at 1389-92 (concurring opinion); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986); *United States v. Marion*, 404 U.S. 307, 325-26 (1971). *Del Vecchio* is a recent capital case in which the issue was squarely presented, extensively discussed, and resolved against the defendant by the full court. Tyson's argument, rather, is that to allow the prosecutor to pick the judge so greatly stacks the deck against the defendant as to make the trial unfair—so unfair as to deny due process of law.

Trial judges have considerable discretionary power (we shall be considering an example from Tyson's trial in the next part of the opinion), and the exercise of discretion is shaped by a judge's values and intuitions, which in turn are shaped by the judge's background and experiences. Among a group of six American judges, even of the same court in the same county, there is likely to be considerable, and relevant, diversity in background and experience. Former prosecutors may have a different bent from former defense lawyers, former lawyers for tort plaintiffs a different bent from former lawyers for insur-

ance companies. One must not exaggerate the impact of a judge's career and demographic characteristics on the judge's decisions. Most judges are conscious of the sources of unconscious bias and try with considerable success to overcome them. The presumption that judges are unbiased, *Del Vecchio v. Illinois Dept. of Corrections*, *supra*, 31 F.3d at 1372, is more than a pious hope. Yet if a litigant can choose which of six judges shall preside at the trial, that party may be able to obtain a subtle advantage over the other by selecting a judge more likely to resolve close questions in that party's favor, even if the trial is to be a jury trial so that the judge will not make the ultimate decision.

Is the advantage thus conferred so egregious as to deny due process of law? Even to reach that question we must decide whether Tyson is asking for a new rule of constitutional law, for if he is we cannot give it to him in a habeas corpus proceeding. *Teague v. Lane*, 489 U.S. 288 (1989); *Saffle v. Parks*, 494 U.S. 484 (1990). He says "no," that the rule he is contending for is as old as Montesquieu, who argued that liberty requires the separation of the judicial power from the executive and the legislative powers. Tyson claims that the only reason there are no cases condemning the practice of the prosecutor's picking the judge (he cites two cases, *State v. Simpson*, 551 So. 2d 1303 (La. 1989) (per curiam); *McDonald v. Goldstein*, 83 N.Y.S.2d 620, 626 (S. Ct.), aff'd, 79 N.Y.S.2d 690 (App. Div. 1948), but they are readily distinguishable from the present one) is that the practice is so patently unconstitutional that few jurisdictions have had the audacity to institute them.

We may assume for purposes of this decision that the absence of a precedent is not always fatal, though we can find no case that says so—though indeed the cases say that relief can be obtained in federal habeas corpus only on the basis of a ground *dictated* by precedent. *Teague v. Lane*, *supra*, 489 U.S. at 301; *Caspari v. Bohlen*, 114 S. Ct. 948, 953, 955 (1994). A rule might be so unexceptionable that it had never been drawn into question in

a reported case. But this is unlikely and in the present setting well-nigh inconceivable. If Tyson is right that allowing the Marion County prosecutor to pick the judge by picking the grand jury is so *obviously* unconstitutional as never to have *had* to be challenged to make its unconstitutionality clear, then why is it that, as we were assured by Tyson's able counsel at the oral argument, not a single one of the thousands of criminal defendants in Marion County who have been convicted after a trial by a judge chosen by the Marion County prosecutor's office has challenged the practice, except Tyson? No doubt most of these defendants were prosecuted by information rather than by indictment. But the Indiana court of appeals pointed out that the prosecutor could pick the trial judge there too, because of the system used for assigning judges to those cases. 600 N.E.2d at 300 n. 33. The answer may be that the constitutional infirmity in the practice, if there is such an infirmity, is subtle rather than obvious. But if it is subtle, habeas corpus is not the place to challenge it. Generalities about fair trials and evenhanded justice are not a substitute for specific holdings as a basis for a state prisoner's claiming in a federal habeas corpus proceeding that an *established* right of his was infringed. *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

Tyson proposes as an *a fortiori* example of an unconstitutional practice a hypothetical system under which only the prosecution had a right of peremptory challenge of prospective jurors. Without meaning to express a view on the constitutionality of such a practice, we point out that it could be defended as appropriate to offset the great advantage enjoyed by the defendant in a criminal case by virtue of the prosecutor's having to prove guilt beyond a reasonable doubt. The system of criminal procedure, far from being balanced every step of the way, is an aggregate of imbalances. The peremptory challenge is a good example. Until the fourteenth century in England, *only* the prosecution could exercise peremptory challenges, and when the rule was changed, still the defendant had, in effect, fewer peremptory chal-

lenges than the prosecutor because the latter was allowed to challenge jurors for cause without actually showing cause. Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 147-48 (1977). In America, not surprisingly, defendants were at first allowed more peremptory challenges than prosecutors, *United States v. Shackleford*, 59 U.S. (18 How.) 588 (1856); *Hayes v. Missouri*, 120 U.S. 68 (1887); Van Dyke, *supra*, at 147-50, but the tendency in modern American law has been toward equalization—in this respect. But with respect to the burden of proof of guilt, the system remains tilted toward the defense, while with respect to the impeachment of witnesses the system is tilted toward the prosecution, because the right to impeach with evidence of prior crimes is more valuable to the prosecutor than to the defense. Many criminal defendants have a criminal history and are afraid to testify lest the jury infer their guilt of the present crime from that history, even though the judge will instruct the jury to consider the history solely for its bearing on the credibility of their testimony.

With respect to investigation, too, the tilt is toward the prosecution—and a significant example is presented by this case. The grand jury was originally understood as a protection for people accused of crime, just like the petit jury. The modern reality is different. The grand jury is an investigative tool of the prosecutor, enabling him to obtain the testimony of witnesses in secret and under oath, without the presence of lawyers to coach or shield them. Instances in which grand juries refuse to return indictments at the request of the prosecutor are almost as rare as hen's teeth. Any doubt on this score with respect to the criminal justice system of Indiana is dispelled by the fact that the choice whether to use a grand jury or skip it and file an information is the prosecutor's. Ind. Code §§ 35-34-1-1(a), (b).

How unfair, one might have expected Tyson to argue, that the prosecutor could decide whether to proceed by grand jury or by the filing of an information, but the

defendant could not. It is as if, one might have thought, only the prosecutor were allowed to make peremptory challenges. That Tyson does not make the argument is a tacit recognition that the constitutionally required balance between prosecutor and defense is indeed a balance between the total advantages enjoyed by each side rather than an insistence on symmetry at every stage in the process.

We do not doubt that a shift at just one stage might so alter the total balance of advantages in favor of the prosecution as to deprive the defendant of the right to a fair trial. *Wardius v. Oregon*, 412 U.S. 470 (1973); *In re Winship*, 397 U.S. 358 (1970). Allowing one side to choose the judge, albeit from a limited pool (judges of the criminal division of Marion County—not all residents of Marion County), might seem to illustrate a shift at one point in the process so momentous as to throw off the entire balance. The prosecutor's power to elect between indictment and information turns out to bear critically on this question. Once he decided to go the grand jury route, as he was entitled to do, he had no choice but to select the trial judge; for he had to designate the grand jury that he would ask to return an indictment, and that designation carried with it automatically the designation of the trial judge. The prosecutor could hardly have said to the judges of the criminal division, "I don't like your system of assignments, and I therefore ask you to assign a grand jury to this case by using a table of random numbers or some other aleatory device." Or, "Please don't assign the judge who presides over the grand jury to try the case; pick the trial judge at random." The prosecutor *himself*, however, could if he wanted pick the grand jury randomly—and for all we know, that is what he did. If so, there was a 16.67 percent chance of his getting Judge Gifford, which is not so low a probability as to prove that the prosecutor did *not* proceed randomly.

If the prosecutor did proceed randomly, the only serious objection to the challenged practice would be that it lacks the appearance of impartiality, and that is not enough to

get Tyson a new trial. In passing, Tyson argues that the power of the prosecutor to pick or refuse to pick Judge Gifford to preside at future cases might cause her to rule in the prosecutor's favor in this case. But we do not understand how this system of rewards and punishments is supposed to work. Is the idea that if Judge Gifford rules in the prosecutor's favor, he will be sure to pick her whenever he has a sex-crime case? Is it plausible that she *wants* that? Or is the idea that he will reward her for ruling in his favor in Tyson's case by *not* steering future sex-crimes cases her way? Or that he will give her complex cases, or simple ones? High-profile cases, or low-profile ones? One could argue with equal force that federal district judges should not be permitted to try federal criminal cases, since the Department of Justice participates actively in recommending district judges for promotion to the court of appeals, thereby creating, on the logic of Tyson's argument, a fatal temptation for district judges to rule in favor of the prosecution. Such conjectures do not rebut the presumption of impartiality.

Tyson's lawyers made no effort to find out why the Marion County prosecutor's office selected Judge Gifford's grand jury and hence Judge Gifford. Had they done so and discovered that her grand jury was chosen because the prosecutors thought her most likely to rule in their favor at trial when discretionary rulings had to be made, then at least we would know that the challenged practice had worked to the prosecutor's favor in this case. It would not show that the judge had been biased in favor of the prosecutor or prejudiced against Tyson; he disclaims making any charge of actual bias or prejudice. All it would show was that she had not been chosen randomly, and this would set the stage for a consideration of the constitutional issue that Tyson asks us to resolve. We cannot get to that stage, because we do not know whether Judge Gifford was chosen randomly, although that she was not is the premise on which Tyson seeks to distinguish *Del Vecchio* and to escape the gravitational pull of *Teague*. For all we know, the prosecutor chose Judge Gifford's grand jury (and hence Judge Gifford) because it had the shortest queue.

The practice of allowing the prosecutor to choose the grand jury and hence the trial judge is certainly unsightly, as the Indiana court of appeals opined; it does lack the appearance of impartiality; but that is all, so far as the record of this case discloses, and it is not enough—despite *Powers v. Ohio*, 499 U.S. 400, 411 (1991), on which Tyson relies heavily. *Powers* holds that a defendant can complain about a prosecutor's racially motivated use of peremptory challenges even if the jurors whom the prosecutor used his challenges to strike would not have been favorable to the defendant. *Powers* is thus a kind of appearance-of-impropriety case. But race is special in the Supreme Court's thinking about criminal procedure. This is not an inference. It is what the Court has said. *United States v. Mechanik*, 475 U.S. 66, 70 and n. 1 (1986); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986). Here is an example: Challenges to the composition of the grand jury are usually moot if the defendant is convicted. The conviction proves that there was probable cause to try him, which means that a properly composed grand jury, had it been doing its job, would have indicted him. The irregularity is therefore harmless. *United States v. Mechanik*, *supra*, 475 U.S. at 70 n. 1 (1986); *United States v. Fountain*, 840 F.2d 509, 514-15 (7th Cir. 1988). But there is an exception for challenges to racial discrimination in the composition of the grand jury. *Rose v. Mitchell*, 443 U.S. 545, 550-59 (1979); cf. *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam). To extend the principle of the race cases to complaints about practices that have nothing to do with race and do not obviously harm the defendant (for remember that *we do not know* whether the state selected Judge Gifford's grand jury because it wanted her to be the trial judge) is the kind of exploratory venture that *Teague* tells us not to embark on in a habeas corpus case.

There are, it is true, other types of constitutional error, unrelated to racial discrimination, that the Supreme Court has said cannot be overlooked on grounds of harmlessness. These include actual bias by the judge, and denial of assistance of counsel as distinct from denial of the right to

effective assistance of counsel. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 (1993). Such cases involve denial of the most fundamental constituents of due process—so fundamental that conviction in their absence is indecent even if the defendant is plainly guilty. "The Constitution requires (unless the defendant waives his rights) a certain modicum of adversary procedure even if the outcome is a foregone conclusion because the evidence of guilt is overwhelming." *Walberg v. Israel*, 766 F.2d 1071, 1074 (7th Cir. 1985). The right to a judge who is free from the mere *appearance* of partiality is not part of due process at all, let alone a fundamental part.

The second, and the most difficult, issue raised by Tyson involves the exclusion of three defense witnesses. To explain it we must delve briefly into the facts. In July of 1991, both Tyson, the former world heavyweight boxing champion, and W____, an 18-year-old contender for the title of Miss Black America, were in Indianapolis for a festival known as "Black Expo." They met briefly at a rehearsal of the Miss Black America pageant, which was part of Black Expo—and at this point the opposing sides' versions of the facts begin to diverge. According to W____'s testimony, Tyson made no sexual advances to her during their initial encounter; nor did they agree to a further meeting. Tyson testified that he told her right out that he wanted to have sexual intercourse with her ("I explained to her that I wanted to fuck her") and that her reply had been, "Sure. Just give me a call." He testified that he had told W____: "that's the way I am. I want what I want." He had testified to the opposite seduction strategy before the grand jury.

Several of the pageant contestants testified that after this initial encounter with Tyson, W____ speculated to them about the size of Tyson's penis, expressed the view that he lacked intelligence, commented about his wealth, noted that his ex-wife had gotten a lot of money out of him, and said that she could have him too. She denied making any of these statements.

At 1:30 a.m. the following morning, Tyson called W____ at her hotel from the phone in the limousine that he was renting. According to her testimony, which was corroborated by one of her hotel roommates and by the driver of the limousine, Tyson pleaded with her to join him for a tour of Indianapolis ("I just want to talk to you. Just come down and we'll go around Indianapolis"). At first she demurred, because she was already in bed, but eventually she consented. He said he was leaving early the next day and this would be their last time to talk. She got dressed and joined him in the limousine. He told the driver to stop at his hotel, because, according to W____, he wanted to get his bodyguard (or get something from the bodyguard—she wasn't sure which). Tyson testified that they were kissing in the limousine en route to the hotel. She denied this, adding in response to a question on direct examination that they had not been holding hands when they walked into the hotel.

They went upstairs to his suite. According to Tyson, they had intercourse there and she had been not only a willing, but an enthusiastic, participant, but had become annoyed afterward when he refused to escort her downstairs. According to W____, when they arrived at the suite she stayed in the parlor while Tyson went into the bedroom to make a phone call. After the call was over he invited her into the bedroom, saying, "I want to talk to you for a second." They chatted innocuously for fifteen minutes. Then Tyson exclaimed, "You're turning me on." Startled, W____ asked to use the bathroom. When she emerged, Tyson was sitting on the bed, clad only in his underpants. She told Tyson, "It's time for me to leave." He grabbed her, forcibly removed her clothes, and raped her. She tried to fight him off, but it was like hitting a wall.

After it was over, she got dressed and left the hotel. According to the limousine driver, she "rush[ed] toward" the limousine and entered it "in a state of shock," "dazed," "disoriented," "frantic," muttering over and over: "I don't believe him. Who do he think he is? He's just a bad person." The driver drove her back to her hotel.

At 4 a.m., Tyson left his hotel for the airport. His bodyguard had made the flight arrangements at 2 a.m., which is to say right after the sexual encounter with W____. So hasty was the departure of Tyson's party that money and clothing were found in the rooms they had just vacated.

There is disagreement over what exactly W____ told her roommates when she returned from the encounter with Tyson. One of them testified that she said Tyson had tried to rape her. Several, however, testified (as did she) that she had told them Tyson *had* raped her. The next day she went to a hospital in Indianapolis for a vaginal examination. The examining physician testified that W____ had fresh vaginal abrasions that had taken a lot of force to inflict. Another physician testified that it was exceedingly unlikely that they could have been inflicted in the course of consensual sex unless the woman had vaginal dryness or some related gynecological condition, which W____ did not. The defendant's expert witness testified that even in the absence of such a condition, consensual sex might generate sufficient friction to cause the abrasions that W____ had experienced. W____ was not otherwise injured, and continued participating in the Miss Black America pageant. The theory of the defense was that W____ had fabricated a charge of rape because her father had threatened to kill her if she had sex and she was afraid that he would hear rumors that she had had sex with Tyson.

All this is by way of background to the issue of the excluded witnesses. Shortly before the trial began, Judge Gifford had ordered the defense to disclose to the prosecution the names, addresses, and phone numbers of all witnesses whose testimony would relate to the issue of consent. The propriety of the order is not questioned. A later order, also unquestioned, made the previous order a continuing one, so that any time the defense discovered additional witnesses whose evidence would bear on consent it was required to disclose their names, etc., to the prosecutor.

The trial began on a Monday, and the prosecution began presenting its case on Thursday. That night, a lawyer working for Tyson's local counsel learned that three women claimed to have information relevant to the case. By Friday evening a member of the defense team had spoken with them. These women claimed to have seen Tyson and W____ necking in the back of the limousine when it arrived at Tyson's hotel and entering the hotel hand in hand. Skeptical that anyone could see into the limousine through its tinted windows, especially at night, the lawyers decided to inspect the limousine. They got a court order (the limousine was back in the possession of the livery service that owned it) on Saturday morning and inspected the limousine that evening and concluded that one could see into the back seat of the limousine easily enough. The next day, after further interviews with the three potential witnesses, they called the prosecutor and gave him the names, addresses, and telephone numbers of the three together with a summary of their expected testimony.

Trial resumed on Monday and the defense immediately moved to be allowed to call the three as additional witnesses, accompanying the motion with an offer of proof. The state objected. It had nearly completed its case in chief and it feared the impact of these surprise witnesses on the jury. Judge Gifford, while not believing that the defense had *deliberately* violated the order (a continuing order, remember) to turn over the information about the new witnesses, appears to have believed that they had violated it, even if innocently, by not turning over the information at the earliest possible moment (which would have been sometime Friday), or at least by waiting until Sunday. After weighing the pros and cons of allowing the witnesses to testify anyway, she refused to let the defense call any of the new witnesses.

The Sixth Amendment entitles a criminal defendant "to have compulsory process for obtaining witnesses in his favor." *Washington v. Texas*, 388 U.S. 14 (1967), held that this provision is applicable to state criminal defendants

via the Fourteenth Amendment and entitles them to call witnesses on their behalf. In reference to this holding, the Court later said: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Judge Gifford's ruling excluded witnesses that Tyson wanted to call to bolster his defense of consent. We use the term "defense" here loosely. Lack of consent is part of the definition of rape and must therefore be proved by the state beyond a reasonable doubt. Ind. Code § 35-42-4-1(a); *Warren v. State*, 470 N.E.2d 342, 344 (Ind. 1984). That of course does not affect the principle to which Tyson appeals.

A court does not violate the Constitution every time it sustains an objection to the testimony of one of the defense witnesses, or for that matter every time it excludes one of those witnesses altogether (for example as a remedy for violating a rule, such as Fed. R. Crim. P. 12.1(d), requiring advance notice of all alibi witnesses). The Supreme Court established the latter point, with specific reference to the exclusion of eyewitnesses on the basis of the violation of a discovery order requiring that their names be furnished to the prosecutor in advance, in *Taylor v. Illinois*, 484 U.S. 400, 410-16 (1988). But the Court made equally clear in that case that the state cannot, in the name of policing the discovery process, arbitrarily stifle a defendant's efforts to offer vital evidence. *Id.* at 409; see also *Lange v. Young*, 869 F.2d 1008, 1011 (7th Cir. 1989). No hard and fast rule has been devised to strike the balance between the competing interests. No one doubts that criminal defendants like other parties to litigation can be subjected to reasonable discovery rules. The central aim of such rules is to minimize surprise at trial by requiring disclosure of witnesses in advance of trial. The rules are empty if they cannot be enforced, and weak if they can be enforced only against willful violators. Although some courts believe nevertheless that the exclusion of a witness or witnesses who would be helpful to the defendant is permissible only if the violation of the

discovery order was deliberate, see *Bowling v. Vose*, 3 F.3d 559 (1st Cir. 1993); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991); *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (per curiam), as it was in *Taylor* itself, other courts disagree. *United States v. Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992); *United States v. Cervone*, 907 F.2d 332, 346 (2d Cir. 1990). Our court has yet to take a position on the question, and *Taylor* itself appears to leave the question open. Apart from any question of willfulness, the right of the trial judge to exclude witnesses sought to be called in violation of a discovery order, if their testimony would be of slight probative value, cannot be doubted. *People of Territory of Guam v. Palomo*, 35 F.3d 368, 374-75 (9th Cir. 1994); *United States v. Duggan*, 743 F.2d 59, 82 (2d Cir. 1984); cf. *United States v. Tanner*, 941 F.2d 574, 585-86 (7th Cir. 1991); *United States v. Wallace*, 32 F.3d 921, 929 (5th Cir. 1994). The area of uncertainty concerns the case in which the excluded witnesses would undoubtedly have been at least somewhat helpful to the defense and the violation of the discovery order was not willful.

We do not think that a hard-and-fast rule to govern that case is feasible or desirable. Given the competing considerations identified above, the highly situation-specific character of the judgment that the trial judge is called upon to make in the hurly-burly of trial, the limited scope of federal habeas corpus, and (a closely related point) the desirability of avoiding continuous and heavy-handed federal judicial intervention in the conduct of state criminal trials, we do not consider it a proper office of a federal court in a habeas corpus proceeding to second-guess a discovery ruling unless we are convinced that it is, in the circumstances, unreasonable. We must examine Judge Gifford's ruling for conformity with the standard of reasonableness.

The discovery order that she had issued in advance of the trial was vague, but she did not abuse her discretion by interpreting it to require the disclosure of newly discovered consent witnesses as soon as possible, which the

Indiana court of appeals not unreasonably interpreted to mean by Friday evening. *State v. Tyson*, *supra*, 619 N.E.2d at 283. Hence the order was violated. It was not a technical or immaterial violation, although it was not willful. Given that the trial had begun, and that the prosecution's case was moving rapidly to a close, the defense can certainly be criticized for having waited until Sunday to notify the prosecutors of the new witnesses. By sometime on Friday the defense team had their names and a rough idea of their testimony, and it should have notified the prosecution immediately, especially since Saturday was a trial day. Tyson's argument that it would have been irresponsible to notify the prosecution before talking to each of the three potential witnesses in person and inspecting the limousine, and even disloyal to Tyson to disclose their identity to the prosecution before making sure that their evidence would not be more helpful to the prosecution than to the defense, is not compelling. If the witnesses proved worthless to Tyson, there would be no harm done to the defense unless it turned out that they could give testimony helpful to the prosecution, but that is always a risk in identifying potential witnesses to one's adversary. *Williams v. Florida*, 399 U.S. 78, 83-84 (1970). The defense could on Friday have sought a modification of the discovery order, but did not do so.

Since, however, the violation of the order was not willful (at least so far as appears), six years in prison for the client would undoubtedly be an excessive sanction for the violation; but we cannot stop there. We must distinguish between sanctions as punishment designed to prevent future violations of similar orders, and sanctions as means of achieving the specific objective of the specific order. Allowing the surprise witnesses to testify would have delayed the trial, and worse. As Tyson concedes, the prosecution would have been entitled to call additional rebuttal witnesses in an effort to offset the impact on the jury of the three new witnesses; or to be granted a continuance to conduct an additional investigation, for example to determine whether it was possible to see into the limousine's

interior at night. Delay in a jury trial is a serious matter, especially when, as in this case, the jury is sequestered. The prosecution's ability to rebut the surprise witnesses effectively would, moreover, have been less than its ability to have pulled their fangs by adroit questioning of W____ and other prosecution witnesses during the case in chief. W____ could have been asked how dark it was and whether there were people standing on the sidewalk when she and Tyson walked into the hotel together and how close their hands were—might an onlooker have *thought* they were holding hands? She could have testified to this on rebuttal, too, had the witnesses been allowed into the case. But to have recalled her to the stand on rebuttal for the express purpose of replying to the surprise witnesses would have magnified the impact of their testimony; would have made it seem that the prosecution had been—surprised. Which it would have been. The purpose of the discovery order was to prevent surprise; and the purpose of excluding evidence whose introduction would have violated the order was not merely to punish violators but also to achieve the objective of the order by keeping surprise out of the case.

We must not exaggerate. The witnesses would, after all, have been testifying to what Tyson had already testified to, and the prosecutor had had ample opportunity not only to cross-examine him but to produce evidence (for example through examination of W____) to contradict him. And if the prosecutor had received timely notice of the witnesses on Friday, it still would have been thrown off its guard to some extent; yet there would have been no violation of the discovery order.

If the test for whether enforcing a discovery order by excluding a witness is, as we think it must be, reasonableness in the circumstances, one highly relevant circumstance is the importance of the excluded witness to the defense. Yet even if in a particular case—and we need not decide whether this is one—the exclusion of a witness were deemed to violate the Sixth Amendment irrespective of the witness's importance to the defense, this would

not necessarily carry the day for Tyson; rather, it would shift our consideration to a different stage, that of harmless error. With certain immaterial exceptions (some of which we mentioned in discussing Tyson's first challenge to his conviction), a constitutional error is grounds for relief in a federal habeas corpus proceeding only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahmson*, 113 S. Ct. 1710, 1721 (1993). This is the standard formula, as the Court explained, for harmless error, but Tyson argues that it is applicable to constitutional claims made in federal habeas corpus proceedings only if the state appellate court, in reviewing the same claim of constitutional error, applied the more stringent standard (harmless error beyond a reasonable doubt) of *Chapman v. California*, 386 U.S. 18, 24 (1967). We think this is wrong. The reasons the Court gave in *Brecht* for adopting a less stringent rule are independent of the rule applied in the state appellate process. See 113 S. Ct. at 1720-21. It has to be wrong, since ordinarily and here the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless error. *Brecht* itself was a fluke in this regard; the state courts had considered the issue of harmless error and applied the *Chapman* standard. Nothing in the Court's statement of its holding suggests a limitation to those peculiar circumstances, see *id.* at 1721—a limitation that would rob the decision of any general significance. And we suggested no such limitation when we interpreted *Brecht* in *Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993). The Fourth Circuit, in *Smith v. Dixon*, 14 F.3d 956, 975-80 (4th Cir. 1994) (en banc), has expressly rejected the proposition that the *Brecht* standard is inapplicable unless the state courts have conducted an analysis of harmless error, and we are not persuaded by the contrary view taken by the Eighth Circuit (without mention of *Smith*) in *Starr v. Lockhart*, 23 F.3d 1280, 1292 (8th Cir. 1994).

So the standard of *Brecht* applies. Tyson flunks it. The surprise witnesses were not witnesses to the alleged

crime. For a woman to kiss (or allow herself to be kissed by) a man in a limousine, and to hold hands with him while walking into a hotel, may be imprudent, depending on the man, but they are not—not in our society, not today at any rate—tokens of consent to sexual intercourse whether in the man's hotel room or anywhere else. They may make his testimony that she consented slightly—very slightly—more plausible, and to that extent be relevant; but they have real significance only if they are denied. The significance of the testimony of the three surprise witnesses would have been as impeachment. Their testimony, if believed, would have suggested that W____ had been lying when she denied having necked with Tyson in the car or held hands with him walking into the hotel; and if she had lied about these things, maybe she had lied about other things—about being raped, for example. Tyson says the witnesses' testimony would have corroborated his testimony; yes, by impeaching a witness who had contradicted his testimony.

We do not suggest that the exclusion of impeaching evidence can never be harmful error. In *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993), we said it could be. Cf. *United States v. Bagley*, 473 U.S. 667, 676-77 (1985). It depends on the circumstances. Here there was plenty of impeaching evidence available to and used by Tyson. A number of witnesses as disinterested as the three surprise witnesses would have been had testified that W____ had told them things inconsistent with her testimony—and inconsistent on more vital points than necking and holding hands. The additional witnesses would have helped, maybe a lot (the state certainly took that position in opposing their admission)—but maybe a lot primarily because they would have been surprise witnesses, and that is a form of help to which the defense was not entitled. And maybe the prosecution could have impeached *them*, by asking them why they had waited till the middle of the trial to come forward with their evidence. Tyson is a celebrity, the trial was heavily publicized, and the defense itself defends its delay in turning over the witness information to the prosecution

by pointing out that it had been flooded with crank calls and needed to make sure these three callers were not cranks.

It is not as if this were a case where the only evidence of rape is the witness's testimony. There was, as we noted, physical evidence of rape. There was the testimony of the limousine driver about W____'s manner when she reentered the limousine. There was also evidence that her clothing had been torn, and a piece left in Tyson's hotel room. There was the precipitous flight from the hotel by Tyson and his party. Given all the evidence and all the opportunities afforded and taken for impeaching W____'s testimony, we cannot believe that the exclusion of the surprise witnesses had a substantial and injurious effect on the jury's deliberations. Cf. *United States v. Martinez*, 988 F.2d 685, 701-02 (7th Cir. 1993); *United States v. Petitjean*, 883 F.2d 1341, 1348 (7th Cir. 1989); *Lange v. Young*, *supra*, 869 F.2d at 1012. We do not have even a "grave doubt" on this score. *O'Neal v. McAninch*, 115 S. Ct. 992 (1995).

The last issue is whether the judge denied Tyson due process of law by refusing to instruct the jury on the defense of reasonable mistake about the existence of consent. In a situation of alleged "date rape," the alleged rapist may have thought the woman was consenting to have sex with him, though she was not. And if his mistake was reasonable, that is a defense under Indiana law, just as in the parallel case of self-defense in a prosecution for murder (and it is a true defense, unlike the "defense" of actual consent to intercourse). Ind. Code § 35-41-3-7; *Boyd v. State*, 564 N.E.2d 519 (Ind. 1991); *Woods v. State*, 587 N.E.2d 718, 723 (Ind. App. 1992). We have already seen that a criminal defendant has a constitutional right to present witnesses in support of whatever defenses to the offense with which he is charged state law creates. The right would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense. *Everette v. Roth*, 37 F.3d 257, 261 (7th Cir. 1994). But that further right comes in-

to play only when there is some evidence. Suppose marriage were still a defense to rape in Indiana. Tyson could not have requested a jury instruction on that defense, because there is no evidence that he and W____ were married.

How much evidence must there be to entitle a defendant to an instruction? Enough to create a reasonable doubt of guilt in the mind of a reasonable juror. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Everette v. Roth*, *supra*, 37 F.3d at 261. There was not enough here. If Tyson was believed, there was actual consent. If W____ was believed, there had been no manifestation of consent. Of course the jury might have believed neither completely, and the question is then whether, had they believed W____ to the extent of agreeing that she had not in fact consented to have sex with Tyson, they might nevertheless have found that Tyson could reasonably have misunderstood her words or behavior as expressing consent. Given the case as it was presented to the jury, such a finding would have been so speculative as to be unreasonable. Nothing in Tyson's testimony gave a hint of possible misunderstanding. According to him, W____ had been not merely a willing but an enthusiastic participant. Obviously the jury disbelieved this. Nothing in W____'s testimony gave a hint of possible misunderstanding either. She did testify that she said "Yeah" when he asked whether she would like to be on top—she testified that she said this in the hope that if she were on top rather than below him this would facilitate her escape—but at this point the crime of rape was complete, because penetration had occurred. The testimony was thus irrelevant to the issue of reasonable mistake about consent. *State v. Williams*, 696 S.W.2d 809, 812-13 (Mo. App. 1985).

Of course the jury might have disbelieved some, even much, of W____'s testimony—might have thought she acted imprudently, might have thought that she knew she was playing with fire, even that she "led him on"—without believing that she consented to have intercourse with Tyson. But to take the next step, and believe that she

manifested consent to him, would require some testimony concerning events in the suite, testimony on which the jury might have hung its judgmental cap; and that is missing. Neither Tyson nor W____ testified to ambiguous words or conduct from which consent might reasonably though erroneously have been inferred. No other witness, either, furnished such evidence. In its absence there was no basis for the requested instruction. *Id.* at 812-13; *State v. McPherson*, 882 S.W.2d 365, 374 (Tenn. Crim. App. 1994); *Boyd v. State*, *supra*, 564 N.E.2d at 523; cf. *United States v. Starnes*, 14 F.3d 1207, 1211 (7th Cir. 1994); *United States v. Searing*, 984 F.2d 960, 966-67 (8th Cir. 1993).

Though it should be obvious, we add that possible manifestations of consent *before* W____ entered the bedroom would not be enough evidence to require that an instruction on reasonable mistake be given. Cf. *Boyd v. State*, *supra*, 564 N.E.2d at 523. The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment.

Suppose the jury had believed Tyson's version of his first conversation with W____ (when, according to that version, she had explicitly consented to have sex with him when he called), but also believed that she had changed her mind sometime between then and the beginning of intercourse and had made her change of mind clear to Tyson. It would still have been too large a step for the jury to take to infer that Tyson could reasonably have assumed consent at that moment. In light of the uncompromising character of Tyson's testimony, the lack of any hint in W____'s testimony of words or acts by which she might have manifested consent after her entry into the bedroom but before the rape, and the absence of any other witness, the jury would have been engaging in sheer speculation had they attempted a reconstruction of the

preliminaries to the rape that would have established the defense of reasonable mistake. We therefore do not think that it was an error, at least an error of constitutional magnitude, to refuse the instruction.

AFFIRMED.

FLAUM, *Circuit Judge*, concurring. I agree with the majority's view that Marion County's now-extinct system for assigning trial judges did not violate Tyson's right to a fair trial and that the trial court did not err in refusing Tyson's proffered jury instructions. I write separately because I believe the trial court's exclusion of witnesses as a sanction for Tyson's breach of the court's discovery order violated his Sixth Amendment rights; an error, however, that in the habeas corpus context of this case must be deemed harmless.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This right is not absolute, however, and must yield to the "enforcement of firm, though not always inflexible rules relating to the identification and presentation of evidence." *Taylor v. Illinois*, 484 U.S. 400, 411 (1984). In *Taylor*, the Supreme Court held that a trial court can in certain circumstances exclude witnesses as a sanction for a discovery breach without violating the constitution. *Taylor* mandates that in determining whether to decree such a sanction, a court must exercise its discretion by balancing a defendant's "fundamental right" against "countervailing public interests," including:

> the integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process. . . .

Id. at 414-15. The Court stated that it was neither "necessary nor appropriate to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* at 414.

The *Taylor* Court upheld the exclusion of an alibi witness of whom the defense had known but had failed to disclose in response to the prosecution's pre-trial discovery request. The Court noted that the defense had acted willfully and in bad faith in not disclosing the witness until after the prosecution's two primary witnesses had testified. In addition, the Court identified a "sufficiently strong inference that 'witnesses are being found that weren't really there,' to justify the sanction of preclusion." *Id.* at 417. "Regardless of whether prejudice to the prosecution could have been avoided [by a less severe sanction], it [was] plain that the case fit[ ] into the category of willful misconduct in which the severest sanction [was] appropriate." *Id*; *see also Eckert v. Tansy*, 936 F.2d 444 (9th Cir. 1991); *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988).

The First Circuit has subsequently found constitutional error in a trial court's exclusion of an alibi witness as a sanction for a discovery violation. *Bowling v. Vose*, 3 F.3d 559 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1236 (1994). In *Bowling*, the defense divulged the name of an alibi witness after the close of the prosecution's case and five days after a prosecution witness testified on cross-examination to an earlier starting time than the prosecution had originally estimated for the arson fire. In applying *Taylor*, the court first noted that the defense had not acted in bad faith because even though it had previously known about the witness, it could not have known of her

importance until after it had cross-examined the prosecution's witness. The court thus viewed defense counsel's conduct as "negligence at worst." The court concluded that the exclusion of exculpatory evidence would distort, rather than further, the truth-seeking function of the trial, and held that the non-willful nature of the violation allayed fears that the testimony had been fabricated. Finally, the court stated that because the evidence consisted of only one witness, whose testimony was not of a technical nature, a continuance could have sufficed, even though the prosecution would have been prejudiced by the introduction of a new defense theory. *Id.* at 562.

Taylor indicates that willful misconduct and clearly unreliable testimony constitutionally support the dramatic sanction of witness exclusion. *Bowling*, on the other hand, teaches that a trial court cannot exclude reliable testimony as a sanction for negligent conduct that would pose minimal prejudice to the prosecution. Turning to the instant case, it is necessary to determine whether the trial court abused its discretion by ordering witness exclusion as a sanction for defense counsel's discovery violation.

As an initial matter, I agree with the majority that the trial court did not abuse its discretion in holding that its discovery order required disclosure as soon as possible. The Indiana Court of Appeals interpreted this to mean Friday evening after an attorney from defense counsel's office had interviewed the women and discussed their information with the trial team. *Tyson v. Indiana*, 619 N.E.2d 276, 283 (Ind. App. 1993) ("The trial court reasonably concluded that, at that time, the State should have been notified of the existence of the women and their potential testimony."), *cert. denied*, 114 S.Ct. 1216 (1994). Therefore, the defense violated the discovery order by failing to apprise the prosecution and court of the new witnesses until Sunday and Monday respectively. The trial court did not find either that the defense had acted willfully or in bad faith or that it should have discovered these witnesses at an earlier date.

A primary ground given by the trial court for excluding the witnesses was their potentially prejudicial effect on the government's case. It has never been held that the defense violated the order for the purpose of achieving a tactical advantage. *See Taylor*, 484 U.S. at 417. The defense's violation may still have given Tyson such an advantage because the defense alone knew of the potential testimony of these witnesses and perhaps used that information in cross-examining several of the prosecution's witnesses. Yet my review of the trial record indicates that the state courts may have overestimated the advantage gained by the defense. The state courts appeared to accept that the defense knew about the testimony when it cross-examined the victim, the hotel personnel, and the limousine driver. The defense actually cross-examined most of these witnesses, including the victim and hotel personnel, before the investigating attorney had interviewed the newly discovered witnesses. Whether the investigator could or should have interviewed these witnesses earlier is not at issue here. Therefore, the defense could only have cross-examined witnesses on Saturday, including the limousine driver, with any unfair knowledge. Moreover, even if the discovery of the witnesses was a surprise, the basis of their testimony was not. Tyson had already testified before the grand jury that he and the victim had kissed in the limousine. *Cf. Chappee*, 843 F.2d at 31 ("Once the Commonwealth had been cradle-slung into a false sense of security, and [their witness] subjected to cross without *fair warning of the nature of the defense*, [the defendant's] chances of success . . . were (unfairly) maximized.") (emphasis added). All of this appears to suggest that the prejudice to be suffered by the prosecution and the advantage to be gained by the defense had the witnesses testified may not have been as extensive as the state courts believed.

The prosecution also argued that the defense's discovery breach had prejudiced it in three other ways. First, the State asserted that the introduction of these witnesses would disturb the rhythm of its case by requiring a continuance of several days, if not a week, while it prepared

to examine them and reevaluated its case-in-chief. Second, it contended that this delay would have adversely affected the sequestered jury. Third, the prosecution maintained that the use of these witnesses would have required it to recall certain witnesses on rebuttal, a potentially less effective method of examination. The trial court seemed to accept some or all of these arguments, stating that "the State has, in fact, been prejudiced in this matter. . . [and the prejudice] cannot be cured by a recess or a continuance because of the fact that we are in the middle and almost completed with the State's presentation of the evidence based on what they thought the evidence was to show." *Cf. United States v. Johnson*, 970 F.2d 907, 912 (D.C. Cir. 1992) (noting that the alternative sanction of a continuance would clearly have "disrupted the trial schedule and harmed the government, which had brought in witnesses from all over the country," and a second alternative of a delay after the prosecution had rested would also have been "burdensome as it would have required holding a jury over during the delay").

This conclusion of prejudice overlooks that the prosecution would have faced most of the delay and disruption even without the defense's discovery violation because it, like the defense, would still have been caught off guard by the arrival of these witnesses. Even if the defense had apprised the prosecution and the court of the existence of these witnesses on Friday evening, the prosecution would have had to attempt to find witnesses to impeach them and would have had to prepare its case accordingly. In determining whether the trial court abused its discretion in holding that the defense's conduct, and the effects of its actions warranted the sanction of exclusion, the defense should not be held totally accountable for such unavoidable consequences.

The late arrival of these witnesses in this well-publicized case could also lead to doubt about the reliability of their testimony. The Supreme Court has said that it is reasonable "to presume that there is something suspect about a defense witness who is not identified until after the 11th

hour has passed." *Taylor*, 484 U.S. at 414. Such a presumption is not appropriate here. These witnesses surprised the defense with their initial contact. Indeed, an attorney not associated with either party in the case but a relative of one of the proposed witnesses twice advised these women not to come forward with their information and to avoid becoming involved in the case. In these circumstances, one cannot easily presume that the testimony was fabricated. The prosecution's contentions that the women may have seen Tyson with his girlfriend on a different night, or that they could not really have seen what they said they did, were more properly matters for the State's cross-examination and a jury determination. Because these witnesses were apparently relevant and not clearly unreliable, their exclusion potentially hindered, rather than furthered, the truth-seeking purpose of the trial.

In light of the discussion above, did the facts of this case warrant the sanction of witness exclusion? The Supreme Court did not hold in *Taylor* that a court could order witness preclusion as a sanction for every discovery violation. *Michigan v. Lucas*, 111 S.Ct. 1743, 1748 (1991). Instead, the exclusion sanction should be limited to the "most extreme situations," *Taylor*, 484 U.S. at 417 n.23, where the defense's conduct and the detrimental effects of that conduct outweigh the defendant's constitutional rights. In my judgment, this case did not present such circumstances. The defense, in violating the discovery order, acted neither willfully nor in bad faith and cannot be said to have seriously endangered the integrity of the judicial system. The testimony was not clearly unreliable and did not present a new defense theory. It is true that the use of these witnesses might have required a continuance in a trial with a sequestered jury and might have required the prosecution to bring back certain of its witnesses on rebuttal. However, the prejudice and delay the State would have suffered in these circumstances cannot be completely attributed to the defense. Balancing these factors, I would hold that Tyson's constitutional rights

outweighed the seriousness and effects the defense's discovery violation. Where, as here, there is no willful misconduct by the defense, limited prejudice to the State, and potentially material testimony, witnesses should not be excluded as a sanction for a discovery violation consistent with the Sixth Amendment.[1]

A finding of constitutional error does not end the inquiry, however, for *habeas* relief is not granted unless the error had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahmson*, 113 S.Ct. 1710, 1721 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also O'Neal v. McAninch*, 63 U.S.L.W. 4126 (U.S. Feb. 21, 1995) ("When a federal judge in a *habeas* proceeding is in grave doubt about whether a trial error of federal law had a substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless.") (internal quotations omitted). As the majority indicates, *Brecht* is applied even if the state courts failed to employ the more stringent "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 368 U.S. 18, 24 (1967).

The erroneous exclusion of cumulative or impeaching evidence usually constitutes harmless error. *See, e.g.*, *United States v. Martinez*, 988 F.2d 685, 701-02 (7th Cir.) (exclusion of victim's racist and violent nature, offered as support for defendant's defense of provocation, if error,

[1] A trial court, of course, has the power to exclude evidence for reasons other than a violation of a discovery order, such as where newly discovered evidence is immaterial and its introduction would cause a serious disruption of the trial, the witness is deemed incompetent to testify, the evidence is hearsay, or there have been other infractions of the rules of evidence. *See People v. Palomo*, 35 F.3d 368, 374 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 750 (1995). I cannot determine what the court would have done absent this specific discovery violation, and how I might view that decision, because here the court relied on the fact that this was a "substantial discovery violation," and excluded the witnesses as a sanction for that breach.

was harmless where other evidence of victim's violence was already before the jury), *cert. denied*, 114 S.Ct. 125 (1993); *United States v. Petitjean*, 883 F.2d 1341, 1348 (7th Cir. 1989) (in extortion trial, any error in limiting cross-examination of victim as to amounts he owed defendant to show victim's lack of credibility was harmless where five other witnesses testified to the victim's poor reputation for truthfulness); *Lange v. Young*, 869 F.2d 1008, 1012 (7th Cir.) (any error in excluding physician's testimony that defendant had previously been diagnosed as paranoid-schizophrenic was harmless where defendant's medical records were admitted and three other doctors testified as to his present schizo-type personality disorder), *cert. denied*, 490 U.S. 1094 (1989). *But see Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993) ("[I]mpeachment evidence can be vital."). In the present case, all of the prior courts, as well as the majority here, have concluded that these witnesses would have presented cumulative impeachment evidence, and I concur. Clearly, this victim was otherwise impeached during the trial. Some witnesses testified that the victim made certain comments about the defendant during the day before the rape, which statements she denied making. Other witnesses testified that the victim told them certain versions of rape, most of them dissimilar from each other and from the account she presented. Even with all of this impeachment of the victim the jury chose to believe her version of the critical events in the hotel room. It is true that the excluded testimony would not have been cumulative in the sense of repeating what other witnesses had previously said or would say. However, these witnesses would have only given additional evidence contradicting the victim, in this case about a matter ultimately distinct from the issue of consent.

Moreover, the jury's verdict was supported by other evidence. In addition to the jury's assessment of Tyson's testimony, the prosecution presented physical evidence of the victim's vaginal abrasions consistent with sexual assault. *See ante* at 13. The State introduced evidence that the

victim's clothing was torn the critical evening and that the police found a sequin from that outfit in Tyson's hotel room. Furthermore, the limousine driver testified to the victim's agitated state after leaving Tyson's hotel and the prosecution tendered evidence of Tyson's hurried departure from Indianapolis shortly after the critical events. All of this serves to buttress the argument that the error in this case was harmless.

In *O'Neal v. McAninch*, the Supreme Court's most recent pronouncement on *habeas* harmless error review, the Court stated that when a judge has grave doubts as to whether an error substantially affected the jury's verdict, he must find that it was not harmless. 63 U.S.L.W. 4126. In other words, when "the matter is so evenly balanced that he feels himself in virtual equipoise," *id.*, the judge must find in the defendant's favor. Against the backdrop of this case, and recognizing the constraints imposed by *habeas* review, I do not possess "grave doubt" about the effect of this error. Although the excluded impeachment evidence was apparently relevant and arguably would have further addressed the victim's credibility, strong impeachment along with significant other evidence corroborating the victim's allegations had already been admitted. In light of this record, I cannot conclude that the excluded testimony would have had a substantial effect on the verdict.[2]

For the foregoing reasons, I concur.

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[2] "Insofar as possible the habeas or appellate court shuns resolving credibility and weighing the evidence. Nevertheless, the *Brecht-Kotteakos* test for harmless error requires the habeas court to evaluate to some extent the probability of the outcome if the case were tried [with the excluded evidence]." *Everette v. Roth*, 37 F.3d 257, 262 (7th Cir. 1994); *Carter v. De Tella*, 36 F.3d 1385, 1392 (7th Cir. 1994); *Cuevas v. Washington*, 36 F.3d 612, 621 (7th Cir. 1994).

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 14, 1995

Before

Hon. Richard A. Posner,
Chief Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Joe Billy McDade, District Judge*

MICHAEL G. TYSON,
Petitioner-Appellant,

No. 94-3359 v.

CLARENCE TRIGG, Superintendent of the Indiana Youth Center; and ATTORNEY GENERAL OF THE STATE OF INDIANA,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.
NO. IP94-591-C
SARAH EVANS BARKER, *Chief Judge.*

ORDER

On March 29, 1995, petitioner-appellant filed a petition for

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* Hon. Joe Billy McDade of the Central District of Illinois, sitting by designation.

rehearing with suggestion of rehearing en banc. All the judges on the original panel have voted to deny the rehearing, and none of the active judges has requested a vote on the suggestion of rehearing en banc. The petition is therefore DENIED.

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IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

MICHAEL G. TYSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-9203-CR-129
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION NO. FOUR
The Honorable Patricia J. Gifford,
Judge
Cause No. 49G04-9109-CF-116245

SHIELDS, J.

Michael G. Tyson appeals his convictions of rape[1] and two counts of criminal deviate conduct,[2] all class B felonies.

We affirm.

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[1] See IC 35-42-4-1(1) (1992 Supp.).

[2] See IC 35-42-4-2(1) (1988).

ISSUES

Tyson raises issues for our review which we reorder and rephrase as:

1. Did the trial court err when it refused to grant Tyson leave to call witnesses for the defense who were not included on his list of witnesses?

2. Did the trial court err when it excluded evidence of alleged incidents between D.W. and her parents?

3. Did the trial court err when it excluded evidence of D.W.'s alleged prior sexual conduct?

4. Did the trial court err when it admitted an audio tape of D.W.'s call to 911, the emergency response number?

5. Did the trial court err when it allowed the State to read from Justice White's partial dissent in United States v. Wade during closing argument?

6. Did the trial court err when it rejected Tyson's tendered jury instructions on the State's burden of

proof and on mistake of fact?

7. Did the trial court err when it refused Tyson's tendered jury instruction on the jury's duty to accept the court's instructions as the law?

8. Did the manner by which the trial judge was selected violate Tyson's right to due process?

FACTS

Tyson was charged with rape, two counts of criminal deviate conduct, and confinement. The confinement charge was dismissed during trial; the jury convicted Tyson of the remaining charges.

Facts pertinent to the issues on appeal appear in the discussion of the particular issue.

DECISION[3]

I.

Tyson argues the trial court erred when it refused to permit him to call as witnesses three women who came forward during the course of the trial.[4] The trial court did not abuse its discretion when it refused to allow the witnesses to testify.

A. Relevant Facts

Prior to trial, on December 11, 1991, the trial court granted the State's discovery motion and ordered that "the Defendant shall disclose to the State of Indiana the names, addresses and phone numbers of all

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[3] Our resolution of each issue pertains to all three charges of which Tyson was convicted, although for clarity's sake, our discussion may center on only one of the convictions.

[4] The motions Tyson used to seek leave to call these witnesses were entitled Motion for Leave to Name Additional Witnesses and Motion for Reconsideration of Order Excluding Newly Discovered Witnesses.

witnesses whose testimony will be relevant specifically to the issue of whether the victim consented to sexual intercourse with the Defendant, on or before December 18, 1991." Record at 493.

Voir dire began on Monday, January 27, 1992; the State began presenting its case on Thursday, January 30, 1992. In the afternoon of that same Thursday, and while the trial court was in session, a secretary from Black Expo contacted the law office of James Voyles, one of Tyson's trial attorneys, and told an associate, Mark Webb, that three women had come forward claiming to have information regarding the Tyson case. Webb spoke to one of the women by telephone midday Friday, and had a face-to-face interview with two of the women, Carla Martin and Pam Lawrence,

on Friday evening.[5]

On Friday evening, immediately after his interview with Martin and Lawrence, Webb met with Tyson's trial attorneys, Voyles and F. Lane Heard, III, and told them what he had learned. Voyles and Heard decided to inspect the limousine to determine whether Martin and Lawrence could have seen through the windows as they claimed. Tyson's counsel prepared a motion to produce the limousine and, after viewing it on

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[5] There is a conflict in the evidence concerning when Webb first made telephone contact with Martin and Lawrence. In his Motion for Leave to Name Additional Witnesses, filed Monday, February 3, 1992, Tyson states that Webb spoke to two of the potential witnesses by telephone Thursday night and then interviewed them at greater length on Friday. Record at 1136. At the hearing on this motion on Tuesday, February 4, Tyson's attorney stated that Webb contacted one of the witnesses around noon on Friday and conducted a face-to-face interview of Martin and Lawrence later that day. Id. at 4160. This same averment is repeated in Tyson's Motion for Reconsideration, id. at 1163, and in Webb's affidavit, attached as Exhibit A to Tyson's Motion for Reconsideration, id. at 1195-96.

Saturday evening, Voyles and Heard concluded that it was possible to see through the tinted windows. Voyles and Heard also decided personally to interview Martin and Lawrence, which they did at 2:00 p.m. on Sunday, February 2, 1992. After that interview, Voyles contacted Prosecutor Gregory Garrison at home and gave him the names, telephone numbers, and addresses of Martin and Lawrence, along with a summary of the information the women claimed to have. Later on Sunday afternoon, Voyles reached the third woman, Renee Neal, by telephone. Voyles promptly contacted Garrison with Neal's information. Representatives of the prosecution team met with the three women some time the next evening.

On Monday, February 3, 1992, Tyson filed the motion in which he sought leave to call Martin, Lawrence, and Neal as witnesses. A hearing on the

motion was held on Tuesday, February 4, after which the court denied the motion. The court also denied Tyson's Motion for Reconsideration, filed on February 7, 1992.

B. Waiver

The first inquiry is whether, as the State claims, Tyson failed to preserve this issue for review. An offer of proof is the method by which the proponent of evidence preserves any error in its exclusion. "When the proponent does not make an offer of proof, he has not adequately preserved the exclusion of [the] witness' [sic] testimony as an issue for appellate review." Wiseheart v. State (1986), Ind., 491 N.E.2d 985, 991 (citation omitted); see also Jones v. State (1988), Ind., 523 N.E.2d 750, 754. An offer of proof provides the appellate court with the scope and effect of the area of inquiry and the proposed

answers, in order that it may consider whether the trial court's ruling excluding the evidence was proper. Thus, the offer of proof must demonstrate the substance, purpose, relevancy, and materiality of the excluded evidence in order to enable the appellate court to determine on appeal whether the exclusion was proper. Strickland v. State (1977), 265 Ind. 664, 670, 359 N.E.2d 244, 249.

The State claims Tyson has waived the issue because his oral offer of proof given during the February 4, 1991, hearing contained only generalized statements of the women's testimony, while his written offer of proof was untimely. The State argues we should not consider the written offer of proof because "it was not provided contemporaneously with the original motion or at the hearing where the exclusion was ordered" and "[s]hould

this Court consider the late offer, the fairness and reciprocity upon which discovery is founded . . . requires consideration of the State's counter-offer of proof . . . when reviewing this issue." Appellee's Brief at 16.

The oral offer of proof is too general; however, the written offer provides a detailed summary of the testimony Tyson anticipated eliciting from Martin, Lawrence, and Neal had they been permitted to testify. Hence, the written offer is sufficiently specific to satisfy the requirements of an offer of proof. Furthermore, it is properly before us; the State's argument is untenable. Tyson's written offer of proof was filed during his argument in support of his Motion for Reconsideration. Thus, it was available to the trial court when it ruled on that motion. On the other hand, the

State's counter-offer of proof[6] was not available because it was not filed until March 25, 1992, well after the trial court had ruled and the trial had concluded. The issue of the trial court's exclusion of the testimony of Martin, Lawrence, and Neal has not been waived.

C. Discussion

The trial court ordered disclosure of witnesses whom Tyson reasonably anticipated would testify by December

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[6] The State's counter-offer of proof asserts Martin would describe the limousine as black in color and would testify that the woman who exited from the backseat of the limousine was approximately "5'6" to 5'7" in height and was wearing a black mini-skirt and a top which had a collar," Record at 1327-28; that Lawrence would describe the limousine as black or burgundy in color and the driver as a white female with blond hair and testify that Martin asked her the identity of the male who exited the limousine's backseat; and that Neal would testify the limousine was white or gold in color and testify that she bumped into the male who exited from the backseat and "did not recognize him as the defendant because she knows what he looks like." Id. at 1329.

18, 1991. Necessarily, the names of Martin, Lawrence, and Neal could not have been disclosed by that date inasmuch as Tyson was unaware of their existence until January 30, 1992. However, two of the purposes of pretrial discovery are to promote justice and prevent unfair surprise. These purposes would be frustrated if there was not a continuing duty upon the parties to disclose the identity of newly discovered potential witnesses as soon as reasonably possible; a party could circumvent disclosure merely by failing to diligently discover potential witnesses until after discovery was closed. Here, in an earlier discovery order, the trial court expressly imposed this duty. Record at 198, 201 ("[I]f the defense, after complying with the order to produce, finds either before or during trial additional information or facts

which are subject to or covered by such order, defense counsel shall promptly notify the Court and the Prosecution of the existence thereof."). Thus, the issue here is whether Tyson violated his continuing duty to disclose the identity of the three women as soon as reasonably possible.

In Wiseheart v. State (1986), Ind., 491 N.E.2d 985, our supreme court outlined factors which are appropriate for a trial court to consider in determining its course of action when a party seeks to use the testimony of a witness whose identity is disclosed to the opponent after discovery has been closed. These factors, paraphrased, include:

1. When did the witnesses first become known to opposing counsel?

2. How vital is the potential witnesses' testimony to the case of the proponent

of the witness--is it relevant and material or merely cumulative?

3. What is the nature of the prejudice to the opponent--would permitting the witnesses to testify have a deleterious impact on the case prepared by the opponent?

4. Are less stringent alternatives appropriate and effective to protect the interest of the parties?

5. Will the opponent be unduly surprised and prejudiced by the inclusion of the witnesses' testimony despite the available and reasonable alternatives (e.g., a recess or a continuance) to allow the opponent to interview the witnesses and conduct further investigation, if necessary?

Id. at 991. On appeal, we apply an

abuse of discretion standard; that is, "[a]bsent clear error and resulting prejudice, the trial court's determinations as to [discovery] violations and sanctions should not be overturned." Shumaker v. State (1988), Ind., 523 N.E.2d 1381, 1383. Based upon the Wiseheart factors, the trial court did not abuse its discretion in excluding the testimony of Martin, Lawrence, and Neal.[7]

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[7] The dissent attempts to characterize our review of the trial court's decision to exclude the testimony of Martin, Lawrence, and Neal as beyond that permissible for an appellate court. Specifically, the dissent asserts that our review must focus on the discretion as it was exercised; that is, "we may not attribute to the trial court some legitimate but unexpressed reason" for its decision. Slip Opinion at 54. Our decision does, however, rest on the specific findings made by the trial court; we do not affirm based on unarticulated but legitimate reasons.

In any event, Palacios v. Kline (1991), Ind. App., 566 N.E.2d 573, and City of Elkhart v. Middleton (1976), Ind., 356 N.E.2d 207, the cases upon which the dissent relies to support its contention that this court's review is

limited to the reasons expressed by the trial court, are distinguishable on several counts. For example, Palacios and City of Elkhart are civil cases that involve Ind.Trial Rule 15 amended and supplemental pleadings, Ind.Trial Rule 14(A) third-party practice, and Ind.Trial Rule 20(A) permissive joinder of parties issues. In addition, Palacios and City of Elkhart concern review of a trial court's exercise of discretion that was premised upon an incorrect legal standard. In contract, here the trial judge correctly determined that the proper legal standard is that found in Wiseheart. Finally, there are a multitude of criminal decisions which hold that a trial court's ruling admitting or excluding evidence may be upheld if there is any basis for the trial court's decision. See Feliciano v. State (1985), Ind., 477 N.E.2d 86, 88 (exclusion of evidence on hearsay grounds would be upheld if inadmissible on relevancy grounds); Hyde v. State (1983), Ind., 451 N.E.2d 648, 650 (if ruling admitting or excluding evidence was correct, no error will lie if trial court states erroneous reason for decision); Thurman v. State (1992), Ind. App., 602 N.E.2d 548, 553, trans. denied (erroneous conclusion by trial court that evidence was found in "plain view" and therefore admissible upheld since evidence was found in "open view" and would have been admissible under this exception to warrant requirement); Wright v. State (1992), Ind. App., 591 N.E.2d 1053, 1056, trans. denied (apparently unexplained decision excluding evidence upheld since evidence was merely cumulative).

The trial began on Monday, January 27, 1992. The office of one of Tyson's trial attorneys was contacted and an associate, Mark Webb, was told about Martin and Neal on Thursday, January 30, 1992, the day the State began presenting its case-in-chief. The prosecution team was first notified of their existence, identity, and the nature of their testimony late in the afternoon on Sunday, February 2, 1992.

Tyson argues the delay was unavoidable because members of the trial team met with the women as soon as possible and "[i]t is not, and cannot be, the law that the defense was obliged either to interview these witnesses earlier than it did or to reveal their existence before interviewing them, evaluating their credibility, and making a decision whether it would or might use them." Appellant's Brief at 30 (emphasis in

original). This argument overlooks the fact that Webb, an attorney from defense counsel's law firm who had "assisted in various capacities in [the Tyson case] since it began and ... had various contacts with witnesses in [the] case during that time," Record at 1195, spoke by telephone with one of the women on Friday around noon, and interviewed Martin and Lawrence on Friday evening before meeting with the trial team to apprise them of what he had learned. The trial court reasonably concluded that, at that point, the State should have been notified of the existence of the women and their potential testimony. Indeed, the record fails to reveal why Webb was unable to talk with Martin and Lawrence earlier or why he did not glean the necessary information from telephone interviews; Neal apparently was contacted only by telephone before the State was informed

that she was a potential witness.

Trial counsel explains the delay between the time when Webb first learned of the proposed witnesses and when the trial team spoke with them, and the need for the trial team to personally investigate the proposed witnesses, by claiming that trial counsel on both sides had received numerous crank calls from people claiming to have information about the case. This, however, does not explain why the judgment of Webb, who had been assigned to investigate such calls and who felt these witnesses were credible, was not sufficient to justify informing the State of the identity of the women and the subject of their anticipated testimony. It also does not explain why it was necessary for the trial team personally to inspect the limousine before notifying the State; Tyson was familiar with the limousine, and in

fact testified that his plans to have sexual intercourse with D.W. in the limousine were thwarted because the partition was not sufficiently dark. Id. at 5070-71. In this respect, the trial court appropriately remarked that it could understand trial counsel's assiduity before trial, but was "a little concerned about allowing a trial to proceed" while such diligent investigation took place. Id. at 4168.

While we, like the trial court, do not attribute blatant and deliberate misconduct or bad faith to Tyson's delay in advising the State of the Proposed witnesses' identity,[8] the

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[8] According to the dissent, the trial court necessarily erred in excluding the proffered testimony because the exclusion of evidence is appropriate only when a finding of blatant or deliberate misconduct or bad faith is made. However, with all due respect, the dissent is incorrect.

Judge Sullivan relies upon Jester v. State (1990), Ind., 551 N.E.2d 840, 842; Patel v. State (1989), Ind., 533 N.E.2d 580, 585; and Boyd v. State

(1985), Ind., 485 N.E.2d 126, 127 to support his position that exclusion of evidence is appropriate only in the rare situation of blatant or deliberate misconduct or bad faith and, further, that the issue of an alleged discovery breach is waived in the absence of a request for a continuance. Taking these issues in reverse order, we agree that a request for a continuance is the predicate for preserving error by the unsuccessful opponent of proffered evidence. However, in the instant case, the dissent would require the State to request a continuance after the trial court announced that it was going to exclude the testimony of Martin, Lawrence, and Neal, apparently to preserve the State's right to respond to Tyson's assertion of error. Logic alone established the incongruity of a position that would require the successful opponent of proffered evidence to request a continuance to preserve the right to defend the trial court's exercise of its discretion in its favor. It is impossible to envision a scenario where the opponent of proffered evidence who is successful in his or her efforts to have the evidence excluded would then ask for a continuance for the purpose of meeting the evidence that the trial court is going to exclude.

Further, there are circumstances other than the blatant and deliberate violation of a discovery order where exclusion of evidence is an appropriate exercise of judicial discretion. The error of Judge Sullivan's contrary position wan recognized recently by our supreme court: "[N]either our trial rules nor Indiana case law require

trial court did not abuse its discretion in determining the delay was excessive; Webb had interviewed Martin and Lawrence at some length and made a judgment regarding the relevance of the information they possessed and their credibility two days before the State was notified.

2. Nature of the Excluded Testimony

The second Wiseheart factor requires an examination of the nature of the excluded testimony.[9]

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evidence of bad faith an a prerequisite for excluding testimony." McCollough v. Archbold Ladder Co. (1993), Ind., 605 N.E.2d 175, 180-81 (citations omitted) (reversing the decision of this court which relied on Patel).

[9] Tyson's written offer of proof, filed on February 8, 1992, in support of his Motion for Reconsideration, reads as follows:

> If called to testify, it is anticipated that Carla J. Martin would testify as follows:
>
> > Ms. Martin, along with Ms. Lawrence and Ms. Neal, attended the Johnny Gill concert at the Hoosier Dome on the night of July 18, 1991. Ms. Martin did so

because she was the girlfriend of a man who was playing drums in Mr. Gill's band on that particular tour. Because Mr. Gill's band was staying in the Canterbury Hotel, Ms. Martin had changed her clothes on the day of the concert in a room in the Canterbury Hotel and left a bag with her belongings at the front desk.

After the concert ended sometime after 12:30 a.m. on July 19, Ms. Martin and her two companions went to the backstage area of the Hoosier Dome in which Mr. Gill's bus was parked. When Mr. Gill's band was fully packed onto the bus, Mr. Martin said good-bye to her boyfriend and she and her companions left the Hoosier Dome. They went to Mr. Lawrence's Nissan 300ZX.

With Ms. Lawrence driving, the three women proceeded to the Canterbury Hotel, in order to pick up Ms. Martin's belongings. Ms. Martin sat crammed behind her two friends in the two-seat sports car. They arrived at the hotel at approximately 1:30 to 1:40 a.m. They pulled their car up next to the curb, just beyond the entrance to the semi-circular driveway of the hotel. Ms. Martin went inside to retrieve her bag, and Ms. Neal also entered the hotel in order to make a phone call.

Ms. Martin got her bag, exited the hotel, and sat down in the front passenger seat (since Ms. Neal had not yet emerged from

the hotel). As Ms. Martin sat there, a limousine pulled slowly into the semi-circular driveway. Ms. Martin looked at the limousine, was able to see through the tinted side windows in its backseat, and noticed a man and a woman hugging and kissing. Ms. Martin exclaimed to Ms. Lawrence that the two people were all over each other.

Ms. Martin then observed that people began to exit the limousine. The woman exited first, from the passenger door facing the hotel, and stepped back so that her upper body was visible to Ms. Martin above the trunk portion of the limousine. Ms. Martin noticed that she was a black woman with shoulder-length curly hair. The second person to emerge from the limousine was a husky black man with large glasses; he exited from the front passenger seat of the limousine. Then, the driver of the limousine, who was a black female with tinted hair, exited; she began to walk around to the passenger side of the limousine. The man who had been kissing in the backseat then exited the limousine, and Ms. Martin immediately recognized him as Mike Tyson. She noted that fact to Ms. Lawrence. Ms. Martin observed the woman move toward Mr. Tyson until their upper bodies appeared to be touching, and she appeared to put her arm in Mr. Tyson's. Ms. Martin then observed Mr. Tyson and the woman enter the Canterbury Hotel, at about the same time that

her third friend was leaving the hotel. Ms. Martin observed that Ms. Neal bumped into Mr. Tyson and the young woman.

* * *

If called to testify, it is anticipated that Carla J. Martin [sic] would testify as follows:

Ms. Lawrence attended the Johnny Gill concert on July 18, 1991 at the Hoosier Dome, with Ms. Martin and Ms. Neal. After the concert ended at approximately 1 [sic] a.m. on July 19, Ms. Lawrence accompanied Ms. Martin and Ms. Neal to the backstage area of the Hoosier Dome where Mr. Gill's tour bus was parked. Ms. Lawrence watched Ms. Martin say good-bye to her boyfriend, who played the drums in Mr. Gill's band, and then she, Ms. Martin, and Ms. Neal walked to Ms. Lawrence's red Nissan 300ZX, which was in an adjacent parking lot.

Ms. Lawrence then drove her car, with Ms. Martin sitting behind the two seats and Ms. Neal sitting in the passenger seat, to the Canterbury Hotel. Ms. Lawrence pulled her car up to the curb in front of the Canterbury Hotel, just beyond the entrance to the hotel's semi-circular driveway. Ms. Martin entered the hotel to pick something up, and Ms. Neal went into the hotel to make a telephone call.

As Ms. Martin exited the hotel and returned to the car, a large limousine pulled into the

hotel's driveway. Ms. Lawrence heard Ms. Martin remark that the two people in the limousine were all over one another; Ms. Lawrence looked over and saw two persons sitting in the backseat of the limousine in close proximity to one another. One of the persons appeared to be a female with prominent hair.

Ms. Lawrence then observed a young black female emerge from the rear passenger-side door of the limousine. Ms. Lawrence observed that the woman had a prominent hair style of a kind not commonly seen among black women in Indiana. Then, Ms. Lawrence observed a black male exit from the rear passenger-side door of the limousine. Ms. Lawrence heard Ms. Martin say that the black male was Mike Tyson. Ms. Lawrence further observed a heavy-set black man in the vicinity of the limousine. Ms. Lawrence observed Mr. Tyson and the young black woman entered the hotel together.

* * *

If called to testify, it is anticipated that Renee Neal would testify as follows:

Ms. Neal accompanied Ms. Martin and Ms. Lawrence to the Johnny Gill concert at the Hoosier Dome on July 18, 1991. The three women left the Hoosier Dome at approximately 1:30 to 1:45 a.m. on July 19. They drove to the Canterbury Hotel in Ms. Lawrence's red sports car, and Ms. Neal entered the hotel to make a phone

According to Tyson, "[i]f called to testify, it is anticipated that" Martin[10] would testify that Martin and

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call.

> As Ms. Neal stood in the hotel parlor and made her call, she looked out the window and observed a gold limousine pull into the hotel's driveway. Ms. Neal observed that the limousine pulled up so close to the hotel that it appeared that it might come through the parlor window.
>
> Ms. Neal then observed a black man and a thin black woman exit the limousine. As she was leaving the Canterbury Hotel, Ms. Neal observed the man and woman holding hands as they entered the hotel. Ms. Neal also observed a heavy-set black man with gold glasses standing near the limousine as she left the hotel and returned to Ms. Lawrence's car.

Record at 1189-93.

[10] The record is devoid of any affidavit, deposition, or testimony from Martin, Lawrence, or Neal; rather, the written offer of proof filed with Tyson's Motion for Reconsideration contained statements of counsel that, "If called to testify, it is anticipated that" Carla J. Martin, Pamela Lawrence, and Renee Neal would testify in a particular manner. Record at 1189, 1192. In fact, the offer of proof recites the anticipated testimony

Lawrence were in a car parked in front of the Canterbury Hotel at approximately 1:40 a.m. on July 19, 1991, waiting for a friend, Renee Neal. Record at 1189-90. While there, Martin observed a limousine pull in front of the hotel. Martin saw "a man and a woman hugging and kissing" in the backseat of the limousine. Id. at 1190. The offer further states that it is anticipated that Martin would testify that she then observed an African-American woman with shoulder-length curly hair and Tyson,

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of an individual identified as Carla J. Martin commencing on page 1 of the offer, Record at 1189; of an individual identified as Carla J. Martin commencing on page 3 of the offer, Record at 1191; and of an individual identified as Renee Neal at page 4 of the offer, Record at 1192. The assertion of Martin's anticipated testimony that appears at page 3 of the offer recites matters about which Martin could not have knowledge as, for example, statements about what Lawrence saw and heard and, accordingly, we conclude the identity of the second purported declarant is, indeed, Lawrence.

whom Martin immediately recognized, exit the backseat of the limousine and enter the hotel. As Tyson and the woman entered the hotel together, Martin saw Renee Neal, who was exiting the hotel, bump into the couple. Martin also observed that, as the couple entered the hotel, the woman "move[d] toward Mr. Tyson until their upper bodies appeared to be touching, and she appeared to put her arm in Mr. Tyson's." Id. at 1191. Martin also saw a husky African-American man with large glasses and an African-American woman with tinted hair exit the front of the limousine.

Tyson asserts that Lawrence, if called as a witness, would testify that she "saw two persons sitting in the backseat of the limousine in close proximity to one another." Id. at 1192. In her opinion, "[o]ne of the persons appeared to be a female with prominent

hair." Id. She observed Tyson and the woman enter the hotel together. Neal's testimony would be that she "observed the man and woman [who had exited a gold limousine] holding hands as they entered the hotel." Id. at 1193.

D.W., on the other hand, testified that Tyson hugged and kissed her when she got into the limousine at her hotel but no further physical contact occurred in the limousine, and that she walked into his hotel behind him, not arm-in-arm or holding hands. Tyson testified that they were "kissing and touching" as they were driven in the limousine to his hotel; he did not describe their conduct upon their arrival at his hotel or as they walked into his hotel. Id. at 5019.

The dissent argues the excluded testimony "is different in kind and character from other evidence adduced at trial." Slip Opinion at 61. It makes

this statement based upon the conclusion that "the manner in which Tyson and D.W. acted toward each other shortly before the acts complained of has extreme relevance to whether or not Tyson might have reasonably believed, from all the surrounding circumstances and events, that D.W. consented even though as a factual matter she did not consent." Id. at 64 (emphasis in original). We most strongly disagree. Even as the dissenter acknowledges that this review "is not about whether Michael Tyson raped D.W. and/or perpetrated two sexual deviate acts upon her," id. at 54, neither is this review about whether Michael Tyson at some point reasonably and honestly believed that D.W. would consent to sexual conduct in the future if the opportunity presented itself. The evidence which the trial court excluded is relevant only to this non-issue. The

record is replete with evidence from which a reasonable fact finder might reasonably conclude that Tyson had such a belief. However, an honest and reasonable belief that a member of the opposite sex will consent to sexual conduct at some point in the future is not a defense to rape or criminal deviate conduct. The only consent that is a defense is the consent that immediately precedes the sexual conduct; it is the defendant's honest and reasonable belief at that point in time, and not at any other point, that is relevant. Therefore, the trial court exercised sound discretion when it determined that the proffered testimony that Tyson and D.W. were "hugging and kissing" in the limousine and that they walked into the hotel hand-in-hand or arm-in-arm was not vital. Instead, it is appropriate to classify that evidence, as the trial court did, as

"in the nature of" cumulative evidence, because, as stated above, the record is replete with evidence from which Tyson might have formed an honest and reasonable belief that D.W. would consent to sexual conduct at some point in the future.

However, we also recognize that the anticipated testimony of Martin would have contradicted the testimony of D.W. that there was no physical contact between her and Tyson after the limousine left her hotel. Nevertheless, as impeaching evidence, the excluded testimony is cumulative;[11] D.W. was

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[11] In response to our discussion of the cumulativeness of the testimony of Martin, Lawrence, and Neal, the dissenter, based upon the testimony of Reverend Katherine Newlin, claims that "the excluded evidence . . . thought by the majority to be cumulative, demonstrates that the jury was entitled to believe that there was consensual sexual contact in the hotel room. . . . At a very minimum [Newlin's] testimony gives rise to a strong and reasonable inference of consensual sexual contact in the hotel room. It is baffling indeed, therefore, that the majority

impeached on other points, including the details of the rape. For example, fellow Miss Black America pageant contestant Madeline Whittington

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proceeds to cavalierly discount the defendant's reasonable belief contention." Slip Opinion at 63. Indeed, we are baffled how the dissent draws its conclusion. Rev. Newlin testified:

> Q: [W]hat did [D.W.] tell you about the physical involvement that occurred between herself and Mr. Tyson?
>
> A: What I recall -- and again, it's not verbatim -- I recall that there was some involvement but it got to a point where she said and indicated no more, and she was communicating to me that that's when it continued on.
>
> Q: Did she tell you, Reverend Newlin, that there was physical involvement up to a point where she said no?
>
> A: Not specifically. There was some sense of participation, but <u>she did not, as I recall, tell or communicate to me or did I hear in the room what that was or meant</u>.

Record at 4398 (emphasis added).

testified that D.W. told her she was going out with Tyson and stated, "This is Mike Tyson. He's got a lot of money. He's dumb. You see what Robin Givens got out of him." Record at 4591. D.W. denied making these comments and several similar comments about which other witnesses testified. Id. at 3355, 3357-58. Pasha Oliver, one of D.W.'s roommates during the pageant and a hostile witness for Tyson, testified that D.W. told her Tyson restrained her during the rape by pinning her wrists together and covering her mouth with his arm or hand, and that she asked Tyson to take her home after the rape and he refused, which made her angry. Id. at 5232. Again, D.W. expressly denied both of these things. Id. at 3323, 3356. Further, there was additional testimony that D.W. gave conflicting accounts of how the incidents in question occurred. See

Appellant's Brief at 11-12 (summary of testimony of several pageant contestants regarding what D.W. told them about how the rape occurred).

In conclusion, the evidence of the conduct that occurred between Tyson and D.W. in the limousine before they entered the hotel and their conduct as they entered the hotel is not crucial considering the spectrum of evidence that corroborates the determination that Tyson reasonably and honestly believed D.W. would consent to sexual conduct in the future and the spectrum of impeaching evidence that was admitted during the course of the trial, including D.W.'s inconsistent descriptions of the critical details of the conduct that occurred in Tyson's hotel room. Therefore, the trial court did not abuse its discretion in determining that the testimony of Martin, Lawrence, and Neal was not

vital to Tyson's defense.

3. Remaining Wiseheart Factors

In weighing the remaining Wiseheart factors, the trial court properly considered that because Tyson first disclosed the existence and identity of Martin, Lawrence, and Neal near the conclusion of the State's case-in-chief, those witnesses known to the State who were in a position to confirm or deny their anticipated testimony, that is, D.W., the Canterbury Hotel personnel, and the limousine driver, Virginia Foster, already had testified and been dismissed. The State asserts, "[o]bviously, had the State known before trial the substance of the new proposed witnesses' testimony, the prosecution would have restructured direct examination and secured additional witnesses to the facts alleged by the new witnesses."

Appellee's Brief at 21. Presumably, contrary to Tyson's argument that the State would have had its witnesses lie, the State's argument is simply that the State would have been able to question its witnesses in its case-in-chief in more detail about such things as where Foster parked the limousine at Tyson's hotel, the lighting in the area, and whether there were other cars or people around. Instead, when Tyson cross-examined D.W., the limousine driver, and personnel from the Canterbury Hotel, only he was aware of the existence and purported testimony of Lawrence, Martin, and Neal. Thus, Tyson was able to elicit testimony from these witnesses without the State being aware of the significance of the testimony. Furthermore, in anticipation of the testimony of Lawrence, Martin, and Neal, and in order to avoid contradicting them, Tyson may have

refrained from propounding questions on cross-examination which he otherwise would have asked.

Also, because the written offer of proof was not submitted until after the State had rested its case-in-chief, if the witnesses in question had been permitted to testify the State would have had to recall its dismissed witnesses on rebuttal. The trial court reasonably considered that the jury may not have accorded this evidence, presented on rebuttal, the same weight as it would have had it been presented during the State's case-in-chief.

The trial court also reasonably considered that, however limited the significance of their evidence might be, the anticipated testimony of Martin, Lawrence, and Neal would have required the State, in the exercise of "good lawyering," to identify, locate, and interview other witnesses, such as

Martin's boyfriend, the drummer for Tyson's friend, Johnny Gill, and Tyson's girlfriend, Angela Boyd.[12] Then, arrangements would have had to be made to secure their testimony in person or by deposition. Of course, at that point, Tyson's counsel, also exercising "good lawyering," would also have needed to interview these witnesses. The trial court reasonably assumed that all of this effort to determine the accuracy of Martin, Lawrence, and Neal's recollection as to the date they observed Tyson and a woman in front of his hotel, and to determine the accuracy of the observations that Tyson and a woman were hugging and kissing and walking hand-in-hand or arm-in-arm, could have

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[12] This additional investigation would have been necessary as a result of evidence that Tyson was present early on another morning with Angela Boyd in his limousine in front of his hotel.

resulted in a delay of several days, or perhaps a week or more. In considering these final Wiseheart factors, the trial court also reasonably considered the fact that the jury in this case was sequestered for the duration of the trial and that the alternative to excluding the proffered evidence, a continuance of several days and perhaps weeks, could have had an adverse impact upon the jury.

The circumstances of this case are closely analogous to those in Shumaker v. State (1988), Ind., 523 N.E.2d 1381, 1384. In Shumaker, the evidence "was largely cumulative of evidence offered by other defense witnesses regarding defendant's propensity for non-violence toward his wife." Id. Here, too, the evidence excluded would have been largely cumulative of other evidence impeaching D.W. and would have only corroborated Tyson's testimony that he

believed D.W. would consent to sexual conduct at some future time, evidence that is irrelevant to the issue of whether she did in fact consent at the critical time. In Shumaker, our supreme court stated:

> While we agree that the extreme sanction of witness exclusion should rarely be imposed absent intentional concealment or substantial resulting prejudice, we cannot fault the trial judge for his imposition of the sanction in this case, given the nature and significance of the proposed testimony and the status of the trial at the time.

Id. Similarly, we conclude that we cannot fault the trial judge for excluding the anticipated testimony of Martin, Lawrence, and Neal, considering its nature and marginal relevance and the status of the trial at the time. There is no error.

II.

Tyson argues that the trial court erroneously excluded evidence regarding

incidents between D.W. and her parents which allegedly would have shown that D.W. had a "powerful and secret motive" to fabricate the rape charge and would have exposed an alternative explanation for the psychological problems experienced by D.W. following the subject incident. Appellant's Brief at 47. He contends that excluding this evidence violated his rights under the confrontation clause and his right to present a defense.

Prior to the trial, the State filed a motion in limine to prohibit Tyson from referring to incidents between D.W. and her parents, and any counseling D.W. received in connection with those incidents. Tyson, who had previously filed a motion to admit evidence of D.W.'s alleged prior sexual conduct and an offer of proof regarding the incidents, Record at 862-68, objected to the State's motion. Id. at

1047-65. The trial court granted the State's motion and the evidence of the incident was not offered during the trial.

A motion in limine serves to prevent the display of prejudicial material to the jury until the trial court has the opportunity to make an evidentiary ruling within the trial context. Hadley v. State (1986), Ind., 496 N.E.2d 67, 71. It is a temporary order and requires a party to notify the court when he or she intends to offer the evidence excluded by the order. Davidson v. State (1982), Ind., 442 N.E.2d 1076, 1078. Merely challenging a trial court's ruling on a motion in limine fails to preserve any error for review. Tyra v. State (1987), Ind., 506 N.E.2d 1100, 1102; Johnson v. State (1985), Ind., 472 N.E.2d 892, 909. In order to raise the question of error, the information must be offered

at trial to give the court an opportunity to determine its admissibility at that time. See Tyra, 506 N.E.2d at 1103; Bieghler v. State (1985), Ind., 481 N.E.2d 78, 93, cert. denied, 475 U.S. 1031 (1986).[13]

As a defense witness, D.W.'s father, Donald Washington, was examined by trial counsel; D.W. and her mother, Mary Belle Washington, were fully cross-examined by trial counsel. Nevertheless, counsel failed either to seek leave to cross-examine D.W. and/or her mother on the subject-matter

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[13] Tyson asserts that a "tiny portion" of the information was erroneously excluded under rape shield concerns. Appellant's Brief at 47; see IC 35-37-4-4 (1988). However, like all evidence excluded under an order in limine, Tyson had the obligation to attempt to present evidence implicating the rape shield concerns so as to challenge the motion and allow the trial court to rule on the admissibility of the evidence within the context of the trial itself. Trevino v. State (1981), Ind. App., 428 N.E.2d 263, 268. He did not do so and thus has failed to preserve any error for our review.

covered by the order in limine and/or to make an offer of proof during Tyson's direct examination of Donald Washington. By not following either procedure, Tyson has failed to preserve any error. The issue is waived.[14]

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[14] Tyson raises three related points in his Reply Brief. First, he contends that the State is "estopped absolutely" from making a waiver argument because during the unrecorded conference regarding the State's motion in limine, Prosecutor Garrison "indicted that the issue was preserved for appellate purposes without it being revisited during the trial." Appellant's Reply brief at 21 (footnote omitted). This argument is without merit; the statement is a legal opinion upon which Tyson's counsel reasonably could not rely.

Second, he argues that his pre-trial offer of proof, pursuant to his IC 35-37-4-4 motion concerning the rape shield exception, was sufficient to preserve this issue for appeal. This is not correct. Only an offer of proof presented during trial preserves an error for our review. See Tyra, 506 N.E.2d at 1103.

Finally, although Judge Gifford granted a joint motion to file the original depositions of D.W. and her parents which allegedly contain references to the incidents, the depositions were neither offered nor admitted into evidence at trial. See

See Davidson, 442 N.E.2d at 1078.

III.

Tyson argues that the trial court erred by excluding all evidence of D.W.'s prior sexual conduct because the State "opened the door" by making "an all out effort to portray [D.W.] as a paragon of innocence and virtue . . . culminating in a suggestion . . . that [D.W.] had been a virgin when she arrived in Indianapolis." Appellant's Brief at 52. Prior to trial, Tyson filed a motion and supporting memorandum to allow reference to D.W.'s alleged prior sexual conduct if the State referred to D.W.'s adherence to Christian principles, her lack of

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Record at 1042, 1105; see also id. at 3092 (defense counsel Vincent Fuller stating during trial that D.W.'s deposition was not part of the record). Thus, Tyson's citations to the "Dep. of [D.W.], Dec. 20-21, 1991, Defendants Ex. 12" and "Dep. of Mary Belle Washington, Dec. 6, 1991," Appellants Brief at 17, 52 n.59, items outside of the record, are unavailing.

sexual experience, or her lack of receptiveness to sexual relations. Record at 849-64. The State opposed this motion and the trial court denied it. Id. at 1104.

Tyson claims that the State's examination of D.W., as well as its opening and closing arguments, left the jury with the impression that D.W. was a "sexual innocent whose religious beliefs prohibited any premarital sex and who was far too naive to understand the implications of going to Tyson's hotel room in the middle of the night," Appellant's Brief at 18, and he should have been able to challenge this impression by cross-examining her about her sexual history. However, again Tyson failed to preserve the pre-trial ruling by the trial court by asking leave of court to cross-examine D.W. on the subject, and thus this issue is not

before this court.[15]

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[15] Assuming that the error was properly preserved for review, the trial court did not abuse its discretion when it excluded evidence of D.W.'s alleged prior sexual conduct. Under IC 35-37-4-4, evidence of an alleged victim's sexual history is generally inadmissible in the trial of the alleged offender. Kelly v. State (1992), Ind. App., 586 N.E.2d 927, 929, trans. denied. The statute was enacted to prevent a general inquiry into the past sexual conduct of the victim in order to avoid "embarrassing the victim and subjecting her to possible public denigration." See Thomas v. State (1984), Ind., 471 N.E.2d 681, 683.

Tyson cites to portions of D.W.'s testimony which he asserts created an impression of innocence, including that she was active in her church, a doer of good deeds, and an award-winning student. He contends that the State's characterization of D.W. during opening and closing arguments as a "kid" with "eyes this big" who put on her "jammies" before bed and who expected to go home "the same girl" after her date with Tyson further enhanced this image. Appellant's brief at 19. Tyson argues he should have been permitted to impeach this "angelic image" by cross-examining her about her prior sexual conduct. Id.

Cross-examining D.W. about her prior sexual conduct in this case falls squarely within the terms of the rape shield statute. Assuming the testimony has some probative value in aid of the theory that D.W. was not as sexually innocent as Tyson argues the State

IV.

Tyson argues that the trial court erred in admitting an audio tape of a telephone call that D.W. placed to 911 approximately twenty-four hours after Tyson raped her. He objected to the use of the tape because it was prejudicial and a prior statement inadmissible under Modesitt v. State (1991), Ind., 578 N.E.2d 649.

In Modesitt, our supreme court, adopting Fed. R. Evid. 801(d)(1)(B), held that:

> a prior statement is admissible as substantive

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suggested, "the legislature has made the determination that evidence of prior sexual history, though arguably relevant to issues such as consent [or witness credibility], is not admissible except for three strictly limited purposes." Kelly, 586 N.E.2d at 929; see IC 35-37-4-4(b)(1), (2), & (3). The cross-examination testimony which Tyson wished to elicit does not fall into any of these three exceptions, and "we may not graft additional exceptions onto the statute." Kelly, 586 N.E.2d at 929. It was thus inadmissible under the rape shield statute, and properly excluded by the trial court.

> evidence only if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Id. at 653-54. Tyson correctly states that Modesitt and Rule 801 recognize that customarily a witness's prior consistent statement cannot corroborate her in-court testimony because, standing alone, a prior statement has little, if any, probative value. The State argues, however, that the tape is admissible under Modesitt because it rebuts the defense's allegations that D.W. fabricated her charge of rape and had improper motives in accusing Tyson.

The admitted tape is consistent with D.W.'s in-court testimony. It does not contain any statements which rebut Tyson's allegation of fabrication or improper motive which were not obtained

by direct or cross-examination. Thus, the tape contains merely cumulative evidence and its admission could, at most, constitute harmless error.[16] The admission of cumulative evidence is not prejudicial and by itself is not grounds for reversal. Miller v. State (1989), Ind., 541 N.E.2d 260, 262; see also McCollum v. State (1991), Ind., 582 N.E.2d 804, 812 (admission of audio tape containing cumulative information not sufficiently prejudicial as to require reversal); Hennings v. State (1989), Ind., 532 N.E.2d 614, 615 (any error in admitting recording of victim's highly emotional call made immediately after rape was cumulative of victim's testimony and therefore

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[16] The parties urge this court to interpret the term "recent fabrication," and offer a plethora of federal cases and cases from other states. However, because the erroneously admitted tape contained only cumulative evidence, we do not address any temporal requirement for admissibility.

harmless).

V.

During closing argument, the prosecutor read a passage from Justice White's partial dissent in United States v. Wade (1967), 388 U.S. 218, 256-57, in which Justice White expounds on the respective roles of defense counsel and the prosecutor in a criminal trial. When the prosecutor told the jury he was going to read from "a landmark case" from the United States Supreme Court, Tyson's counsel objected, stating, "Your Honor, I object to Mr. Garrison reading case law to the jury. I believe that's in the Court's province, not Mr. Garrison's." Record at 5500. The court overruled the objection, and the prosecutor proceeded to read from Justice White's opinion at some length. On appeal, Tyson argues it was error to allow this passage to be read because it was "a prejudicial,

irrelevant, and secretly edited[17]

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[17] Tyson's appellate counsel asserts that the prosecutor omitted a sentence from the passage he read, and claims that he "deliberately and secretly omit[ted] the most crucial sentence from the quoted paragraph" to Tyson's detriment. Appellant's Brief at 57. The prosecutor read the following passage:

> Law enforcement officers have the obligation to convict the guilty and to make sure that they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of a crime. To this extent our so-called adversary system is not adversary at all, nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. The defense counsel needs to present nothing, even if he knows what the truth is. He need not furnish any witness to the police or reveal any confidence of his client or

excerpt from Justice White's dated dissenting opinion, Appellant's Brief at 55 (footnote added), which "never

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> furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure, or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in worse [sic] possible light regardless of what he thinks or knows to be the truth. In this respect, as part of our modified adversary system and as part of the duty imposed upon honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relationship to the search for the truth.

Record at 5501-02. The sentence omitted by the prosecutor reads: "Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying." See Wade, 388 U.S. at 257. We are unclear how Tyson was prejudiced by the omission of this sentence which impugn the conduct of defense counsel.

was and is clearly not today the law," Appellant's Reply Brief at 26.

This issue is not properly before us for review for two reasons. First, Tyson objected only to the prosecutor reading case law in general; he did not make a specific objection to the particular case, that is, his only objection was made before counsel began reading from Wade, and thus could not have possibly addressed the substance of what was read. "The grounds for objection on appeal must be the same as those made at trial and any grounds not raised in the trial court are not available on appeal." Fozzard v. State (1988), Ind., 518 N.E.2d 789, 792 (citation omitted); Wright v. State (1992), Ind., 593 N.E.2d 1192, 1194, cert. denied, 113 S. Ct. 605 (1992). While Tyson's trial counsel could not have been expected to be "a walking encyclopedia who had committed the Wade

opinion to memory, so that he could instantly know that the prosecutor not only misstated when he said he was reading from the 'law,' and from a 'concurring opinion,' . . . but also know that the State was editing out key portions of the excerpt," Appellant's Reply Brief at 27, it is reasonable to expect counsel to make a specific objection after it was apparent, by inquiry if necessary, from which case the prosecutor was reading. In particular, counsel may be expected to listen to what is read and object if he or she feels it is prejudicial to his or her client. Thus, Tyson's failure to object to the reading from Wade in particular, rather than to the reading of law, in general, constitutes waiver of this issue.[18]

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[18] In addition to making an insufficient objection, Tyson failed to properly preserve this issue because he failed to ask for an admonition and mistrial.

> [W]hen an improper argument is alleged to have been made the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, the correct procedure is to make a motion for a mistrial. Failure to request an admonishment or move for a mistrial results in waiver of the issue of improper argument.

Brewer v. State (1993), Ind., 605 N.E.2d 181, 182 (citations omitted); see also Dresser v. State (1983), Ind., 454 N.E.2d 406, 407.

Tyson's appellate counsel argues that trial counsel did not request an admonishment or mistrial because to do so after the court had overruled his objection "would have been to become a 'chattering magpie.'" Appellant's Reply Brief at 27 (citing United States v. Kelinson (1953), 2d Cir., 205 F.2d 600, 602). The Indiana supreme court rejected this argument in Dresser, 454 N.E.2d at 407 ("We acknowledge that the court overruled the objections that were made, which strongly indicates that such motions [for admonishment and mistrial] addressed to the objections would also have been overruled. Nevertheless, the objections made and rulings thereon preserved nothing for appellate review."), and reaffirmed its position just this year in Brewer, 605 N.E.2d at 182-83 (failure to move for admonishment or mistrial waived issue of alleged improper use of Wade opinion in closing argument, even though appellant's objection was overruled).

VI.

Tyson argues the trial court committed reversible error when it refused to give his Tendered Instructions Nos. 5 and 6, both of which deal with Tyson's belief regarding D.W.'s consent to sexual acts. The instructions in question read as follow:

> Tendered Instruction No. 5:
>
> Before you may return a conviction on any count, you must be satisfied that the State has proved beyond a reasonable doubt that the defendant knowingly forced the complainant to engage in the sexual acts charged. This means that the State must prove beyond a reasonable doubt that the complainant did not consent and, in addition, that the defendant did not reasonably believe that she had consented.
>
> Tendered Instruction No. 6:
>
> The defense of mistake of fact is defined by law as follows: It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the

> culpability required for the commission of the offense. The reasonable mistake about a fact must have prevented the defendant from acting intentionally or knowingly as those terms are defined by law. In this case, it is a defense to all the charges that the defendant was reasonably mistaken about whether the complainant consented to the sexual acts in question. The State has the burden of disproving this defense beyond a reasonable doubt.

Record at 1235-36. Although we recognize the implicit differences between "reasonable belief" and the "defense" of mistake of fact, we consider the tendered instructions together because, as Tyson notes, "[f]or purposes of this case, there is no significant difference between the defenses of mistake of fact and reasonable belief as to consent. Both require the defendant reasonably believe the complainant consented to sex." Appellant's Brief at 39 n.41.

Jury instructions lie largely within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Woods v. State (1992), Ind. App., 587 N.E.2d 718, 722, trans. denied; Crabtree v. State (1989), Ind. App., 547 N.E.2d 286, 292, trans. denied. When the trial court refuses to give an instruction, we must determine whether the tendered instruction correctly states the law, whether there is evidence in the record to support the giving of the instruction, and whether the substance of the tendered instruction is covered by instructions which were given by the trial court. Crabtree, 547 N.E.2d at 292; see also Aschliman v. State (1992), Ind., 589 N.E.2d 1160, 1162.

Assuming that Tendered Instructions Nos. 5 and 6 correctly

state the law in Indiana,[19] the

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[19] Although not argued by the State on appeal, a credible argument can be made that the tendered instructions do not correctly state the law in Indiana because they incorrectly focus on Tyson's perception of D.W.'s consent.

The culpability required for the commission of an offense is defined in IC 35-41-2-2(d) (1988) which provides: "Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct." Thus, unlike the Model Penal Code, which requires culpability with respect to every material element of the offense, the Indiana Criminal Code requires culpability only with respect to the prohibited conduct. Compare Rose v. State (1982), Ind. App., 431 N.E.2d 521, 524 n.1 and Markley v. State (1981), Ind. App., 421 N.E.2d 20, 21 with Model Penal Code § 2.02(4) (1962) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."). This distinction was emphasized by the amendment to the culpability statute which occurred in 1977. A prior version of IC 35-41-2-2(d) required culpability with respect to material elements of "prohibited conduct and its attendant circumstances." IC 35-41-2-2(d) (1976).

By deleting the phrase "and its attendant circumstances," the legislature expressed its intent to limit the culpability requirement to prohibited conduct only. Markley, 421 N.E.2d at 21 ("If the legislature had intended culpability to apply to every material element, the phrase 'of the prohibited conduct' would be superfluous.").

The significance of the fact that culpability is not required for attendant circumstances is illustrated by the statutory definition of the mistake of fact defense. IC 35-41-3-7 (1988) defines the defense as follows: "It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense." (emphasis added). Thus, an alleged mistake of fact with reference to an attendant circumstance for which there is no culpability required is not within the parameters of the defense.

To determine if the defense is available, therefore, the elements of a statute must be broken down into those of prohibited conduct and those of attendant circumstances. In rape, for example, the statute provides in relevant part: "A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when . . . the other person is compelled by force or imminent threat of force . . . commits rape." IC 35-42-4-1 (1992 Supp.) The prohibited conduct in the offense of rape in sexual intercourse with a member of the opposite sex by

force or imminent threat of force. Compulsion of the victim, while an element of the offense, is an attendant circumstance, not prohibited conduct. Similar treatment could be given to the offense of criminal deviate conduct. Because culpability is not required as to attendant circumstances, and the mistake of fact defense is available only as to prohibited conduct which requires culpability, evidence that the defendant reasonably believed that the alleged victim consented to the sexual conduct is irrelevant.

Of course, although lack of consent is not an element of rape or criminal deviate conduct per se, evidence which has a tendency to prove either consent or lack of consent in relevant to the element of compulsion, which exists in both offenses. Evidence that the alleged victim consented to the sexual act is evidence that negates compulsion, while evidence that the alleged victim did not consent may be evidence that the victim was compelled.

Arguably, then, in order to raise the defense of mistake of fact in a rape or criminal deviate conduct case, there must be evidence that suggests the defendant was reasonably mistaken as to whether a sexual act occurred or whether force or threatened force was used, the prohibited conduct components of the offenses. Evidence that the sexual act or force or threat of force did not occur cannot raise a mistake of fact "defense" because that evidence denies the prohibited conduct, and there cannot have been a mistake about conduct which did not occur. For example, Tyson testified that he did

instructions do not meet the second prong of the test, that is, there is no evidence in the record from which a reasonable juror could conclude that Tyson reasonably believed D.W. consented to the sexual conduct.

Indiana has long recognized that an honest and reasonable mistake concerning a fact excuses criminal conduct which would not be criminal if the fact had been as the defendant reasonably believed. Davis v. State (1976), 265 Ind. 476, 478, 355 N.E.2d 836, 838; Noble v. State (1967), 248 Ind. 101, 105, 223 N.E.2d 755, 758; Squire v. State (1874), 46 Ind. 459,

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not, at any time, force D.W. to engage in sexual conduct. Record at 5032 ("I did not violate her in any way."). Accordingly, he neither argues that he was reasonably mistaken an to the occurrence of sexual conduct or as to his use of force, nor does he claim that evidence of such a mistake was presented. Instead, he claims he was reasonably mistaken as to D.W.'s consent, a mistake which, arguably, in not a defense to rape or criminal deviate conduct.

461. "Honesty is a subjective test dealing with what [the defendant] actually believed. Reasonableness is an objective test inquiring what a reasonable man situated in similar circumstances would do. To require the giving of [the defendant's] instruction, we must find some evidence of both." Davis, 265 Ind. at 481, 355 N.E.2d at 839; see also Woods v. State (1992), Ind. App., 587 N.E.2d 718, 723, trans. denied (An instruction which defines mistake of fact as a defense with three elements, one of which is that the mistake must be subjectively honest and objectively reasonable, clarifies the defense for the jury.)[20]

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[20] The dissent makes "much ado about nothing," that is, that a mistake of fact instruction was given in Woods. In Woods, the propriety of an instruction on the defense was not an issue because both the State and the defendant tendered a mistake of fact instruction. Thus, Woods is not authority for the proposition that a mistake of fact instruction is always appropriate if consent is an issue.

Thus, if the State presents a prima facie case of guilt, the defendant has the burden of going forward with an evidentiary basis for his mistaken belief of fact which could create a reasonable doubt in the jury's mind that he acted without the requisite mental state. Hoskins v. State (1990), Ind., 563 N.E.2d 571, 575; Stoner v. State (1982), Ind., 442 N.E.2d 983, 985. Requiring a defendant to establish an evidentiary basis does not shift the burden of proof; the State retains the ultimate burden of proving beyond a reasonable doubt every element of the charged crime, including culpability, which must entail proof that there was no reasonably held mistaken belief of fact. Hoskins, 563 N.E.2d at 576.

Tyson asserts that his testimony provides ample evidence to support Tendered Instructions Nos. 5 and 6.

During direct examination, Tyson testified that "I believe that we had both made it clear earlier that day what was going to happen, and that she came to my room at 2 o'clock in the morning. I'm sure we made it clear,[21] Record at 5078; that D.W. responded in a positive manner to his kissing in the limousine while riding to his hotel, id. at 5019; and that while he was kissing her in the hotel room she was "dropping her jacket, you know, getting her jacket off quick," id. at 5023. He also testified that he complied with D.W.'s request not to ejaculate in her and that he asked her to stay the night.

Assuming Tyson's assertions, that he believed he and D.W. "made it clear" earlier in the day that they were going

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[21] Tyson testified that earlier in the day, soon after he had met D.W., he explained to her "That I wanted to fuck her," and she responded, "Sure, just give me a call." Record at 5000.

to have sexual intercourse and that, after the sexual conduct occurred, he asked her to spend the night with him, provide some evidence that he honestly believed D.W. consented to sexual intercourse, the assertions are not evidence of the reasonableness of that belief. See Davis, 265 Ind. at 481, 355 N.E.2d at 839. To determine whether there is evidence that Tyson's assumed belief was reasonable, we look to his description of the encounter:

> Q.: Did you undress her?
> A.: I did.
>
> * * *
>
> Q.: What happened then, Mr. Tyson?
> A.: As I'm kissing her, she's moving fast. I'm kissing her. She dropping [sic] her jacket . . . . I'm kissing on her neck and I'm kissing her around the ears, the back of her neck, her chest, her nipples, her stomach, and I believe she had a white shirt on as well. She's trying to get that off. So I came back while she was taking it off and she had taken off those shorts--she had some shorts. She took off her shorts. I took my shirt off at the time. She had took [sic] off

her underwear and the underwear dropped to her knees, and I pulled the underwears [sic] off, and then I took off--I had shorts that I had took off [sic]. I continued kissing on her body.
Q.: Then what happened?
* * *
A.: We were having oral sex a little while, and she had told me to stop, and she had told me to come up, come up. She said, "No, come up."
Q.: Meaning what?
A.: Indicating that she wanted me to insert my penis in her.
* * *
Q.: And what did you do then?
A.: She had told me not to come in her. She said, "Don't come in me, don't come in me. I'm not on the pill," and I pulled back and I ejaculated on her stomach and her leg.

Record at 5023-24.

Tyson's description is a plain assertion of actual consent. From this testimony, a reasonable jury could infer only that D.W. actually consented to sexual intercourse. There is no recitation of equivocal[22] conduct by

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[22] Equivocal is defined as "having two or more significations: capable of more than one interpretation: of

D.W. which reasonably could have led Tyson to believe that D.W. only appeared to consent to the charged sexual conduct; no gray area exists from which Tyson can logically argue that he misunderstood D.W.'s actions. According to Tyson, he exerted no force and D.W. offered no resistance; instead, she was an active and equal participant in the conduct. While this testimony would negate an element of the crime -- that Tyson forcibly engaged in sexual conduct with D.W.--and challenges D.W.'s credibility, it does not support the giving of a mistake of fact instruction.[23]

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doubtful meaning: ambiguous." Webster's Third New International Dictionary 769 (1976).

[23] Tyson's testimony that he complied with D.W.'s request not to ejaculate in her is not relevant to this issue, as it does not tend to prove he believed that she consented to the sexual conduct immediately preceding its occurrence.

Tyson further argues that "many of the statements [D.W.] admitted she had made to [Tyson] during the sexual conduct itself were consistent with a reasonable belief on his part that the sex was consensual." Appellant's Brief at 44. Specifically, D.W. testified that when Tyson saw she was crying during the rape and after the two acts of criminal deviate conduct, he asked if she wanted to "get on top," to which she responded in the affirmative without then explaining to him that she agreed to go on top only because she thought it would enable her to get away," id.; and that she asked Tyson to, "Please put a condom on"[24] and

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[24] This statement, by itself, does not reasonably support the inference that D.W. consented to sexual intercourse. However, D.W.'s request, along with Tyson's response, that he would prefer to ejaculate[] on her stomach and leg," Record at 5024, and Tyson's after-intercourse statements--"I told you I wouldn't come in you. Don't you love me now?" id. at 3153--suggest only the inference that

said, "I don't need a baby," Record at 3151. Tyson argues that "[a] properly instructed jury could have found (or entertained a reasonable doubt) that these exchanges could have led a reasonable person to believe that [D.W.] consented, even if in her own mind she may not have been consenting." Appellant's Brief at 44. However, in the context in which these statements occurred, that is, amidst D.W.'s unequivocal description of a sexual assault, they could not, as a matter of law, lead a reasonable person to believe that Tyson was reasonably mistaken as to D.W.'s consent to sexual intercourse.[25] Further, these

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Tyson was aware that D.W. did not consent to unprotected sexual intercourse.

[25] D.W. testified on direct examination:

A.: I walked out of the room, out of the bathroom . . . and then I glanced over and I saw

the Defendant in his underwear. . . .
Q.: What was your reaction?
A.: I was terrified.
Q.: What did you say?
A.: "It's time for me to leave."
Q.: Like that?
A.: Yeah.
Q.: And his response?
A.: "Come here." And he grabbed my arm, and then he was, like, "Don't fight me. Come here," and then he stuck his tongue in my mouth.

* * *

Q.: What did you do?
A.: Just pulled back. . . . He started saying, "Don't fight me." I tried to fight him. . . . It was like hitting a wall. It didn't do anything.
Q.: What did he do next?
A.: He started taking off that outer jacket that I had on. He started taking that off, and I'm like, Get off me. Stop. Get off me," and he just kept going. Then the next thing I knew, he put me down on the bed or slammed me actually down on the bed, and he started grabbing the rest of the stuff down, and he kept kissing me and kept saying, "Don't fight me, don't fight me, relax, don't fight me.

* * *

Q.: Did you try to negotiate with him?
A.: Yeah. What was after he put his hands in me, his

fingers, in my vagina.
Q.: Okay, How did he get his hand down there?
A.: He was between my legs, and he just put his fingers in there, started jamming them in really, really hard, and that's when tears started to come to my eyes, and I was, like, "owww, please, stop."

* * *

Q.: Did you mention to him that you were worried about pregnancy?
A.: Yeah. That was--he started to pull out his penis, and he was over me, and I just freaked out and I started saying anything because I knew that hitting him and stuff wasn't going to help me. So, I just started saying anything that I could think of, like, "Please, I have a future ahead of me. Please, I have college. I can't have a baby. What are you doing?" You know, "Please put a condom on." I was just--anything to get him off of me so that I could get out of there, and he was just, like, "Well, I don't have anything and I know that you don't." I'm like, "Please, I don't need a baby. I don't need a baby." I was begging him. I was saying anything that I could say to him, and nothing worked. He was just, like, "So we'll have a baby," and he just jammed himself in me. . . . [H]e exposed his

penis.
Q.: What did he do then?
A.: He jammed it in my vagina.
Q.: What did you do?
A.: I screamed out--not screamed, but I was like, "Owww," and then I just started crying and I--
Q.: Pain again?
A.: Yes.
Q.: Did you tell him you hurt?
A.: Yes. . . . It was just excruciating. It just hurt. He just slammed himself in me. It just felt like someone was ripping me apart. I don't know how to explain it. It just hurt.
Q.: Okay. What efforts, if any, did you make to try to get loose, to try to get away?
A.: I was trying to punch him and stuff like that. I was trying to back up. I was trying to do a lot of things. Nothing worked.
Q.: Okay. What's he doing while you're trying to do all this?
A.: He was telling me not to fight him, and then he started saying, "Don't fight me, mommy. Don't fight me," and he just kept going. He just kept slamming himself really hard.

* * *

Q.: Did you change position?
A.: At one point, he said, "Oh, you're crying," and he stopped for a second and his

statements all occurred after the criminal deviate conduct took place; therefore, they could not support a mistake of fact defense to the criminal

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> voice started to, like, be a little bit normal again, and then he just turned evil again, and really mean, and his eyes got all mean, and he just kept going really hard, and then he goes, like, "Well, do you want to be on top?" and I thought I could get away. So I said, "Yeah," and I was crying when I said it, and he flipped over. Then I tried to get away, and he was, like, "I told you not to fight me," and he slammed me back down again and rolled back over again.
> Q.: Okay. Do you have any idea as to how long he remained inside of you?
> A.: Until he was done. . . . Until he ejaculated.
> Q.: Did you see him do that?
> A.: Yes.
> Q.: Tell us what he did.
> A.: He pulled back and there was stuff coming out, and he said, "I told you I wouldn't come in you. Don't you love me now."
> Q.: He said, "Don't you love me now?" and what was your response?
> A.: I just looked at him like I was disgusted.

Record at 3144-53.

deviate conduct counts.

As Tyson argues, "as a matter of Indiana law, he is entitled to have the jury consider all available testimony in order to determine whether he actually and reasonably mistook [D.W.'s] words and conduct to communicate her consent." Appellant's Reply Brief at 19 n.34 (emphasis in original). However, an examination of the testimony of D.W. and Tyson, the only testimony available as to the events in the hotel room, reveals evidence of only consent or compulsion; there is no evidence of equivocal conduct that a reasonable person in Tyson's position could have reasonably misinterpreted as D.W.'s consent to the charged sexual conduct.

Tyson asks us to consider that D.W. "met Tyson later, under circumstances which suggested an interest in sex--she accepted an

invitation at 1:40 A.M., voluntarily accompanied Tyson to his hotel room, and willingly sat on his bed with him." Appellant's Brief at 44. This conduct may support a determination that a reasonable person in Tyson's position reasonably could have believed D.W. would at some point be willing to consent to sexual conduct; it also is consistent with Tyson's testimony of consensual sexual conduct. However, considering D.W.'s testimony of unequivocal compulsion at the time the sexual conduct occurred, her willingness to meet him and her alleged "interest in sex" does not support the determination that a reasonable person in Tyson's position reasonably, but mistakenly, could have believed that D.W. consented to sexual conduct at the pertinent time--immediately preceding the sexual conduct.

Tyson testified to one set of events, D.W. to another. Tyson's testimony compels the conclusion that D.W. unequivocally gave her actual consent to sexual conduct and participated in it; D.W.'s testimony compels the conclusion that Tyson forcibly performed sexual conduct upon her. Thus, neither witness's testimony provides the basis for a reasonable mistake because neither testimony contains equivocal conduct which reasonably could have been misunderstood by Tyson.

Neither is there conflicting testimony which could be harmonized so as to support a mistake of fact instruction; D.W. and Tyson did not testify to different interpretations or perceptions of basically uncontroverted conduct. Their respective testimonies describe two different and irreconcilable events that cannot be

harmonized and taken together to provide evidentiary support for the instruction in question.[26]

"In spite of our preference to leave determinations of reasonableness to the jury, which embodies the values of the community, we find no evidence here from which the jury could have determined that [Tyson's] belief was reasonable," as required by Indiana law.[27] Davis, 265 Ind. at 481, 355

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[26] Tyson argues that a "properly instructed jury might well have concluded that the truth of what occurred in the hotel room lay somewhere between Washington's inculpatory account and Tyson's exculpatory one." Appellant's Brief at 46 (emphasis in original). This, however, is not a criteria for our review of a tendered instruction; rather, we review the record to see if the evidence presented could support the instruction.

[27] The dissent cites People v. Burnham (1987), 176 Cal. App. 1141, 222 Cal. Rptr. 630, rev. denied, in which the California Court of Appeals states that whenever a defendant testifies to the complainant's unequivocal consent to sexual conduct he also triggers the "defense of a bona fide belief in the victim's consent" and a mistake of

fact instruction is required. Id. at 1148, 222 Cal. Rptr. at 641 (citations omitted). Thus, under Burnham, as long as a defendant expresses his subjective belief that the victim consented, a mistake of fact instruction is warranted whether or not that belief was reasonable. This view is not uniformly held in other jurisdictions. In Indiana, evidence from which a reasonable jury could find both an honest and reasonable belief on the part of the defendant is required before a mistake of fact instruction may be given. Davis, 265 Ind. at 479, 355 N.E.2d at 839. Evidence of actual consent alone does not trigger the instruction regarding mistake of fact. The dissent suggests nothing more than that we (1) modify Indiana law requiring evidence of objective reasonableness by deleting that requirement, or (2) require such a minimal showing of objective reasonableness as to, in essence, require nothing more than a subjective belief of consent.

The dissenter's statement that "[r]efusal to give the instruction upon grounds that no reasonable person would have interpreted the evidence to indicate the victim's consent impermissibly invades the jury's province" is in error. Slip Opinion at 67. As stated, there must be evidence in the record of an honest and reasonable mistake of fact in order to require the giving of a mistake of fact instruction. Thus, our review of the evidence necessarily includes a determination of whether a reasonable person in the appellant's position could have interpreted the

N.E.2d at 840.

In contrast, the trial court's instructions to the jury were accurate. The trial court gave Final Instruction No. 19, which articulates the elements of the crime of rape, including "the State must have proved . . . [Tyson] . . . knowingly or intentionally . . . had sexual intercourse with [D.W.] when . . . [D.W.] was compelled by force or

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complainant's actions as indicating consent to the sexual conduct. This court has historically applied this standard in determining whether a trial court erred in refusing to give a requested instruction. See, e.g., Davis, 355 N.E.2d at 839. Our analysis of the evidence differs from the jury's because we must determine whether as a matter of law the evidence of record supports the giving of a mistake of fact instruction. We do not ask, as the jury would if an instruction were warranted, whether, in fact, the defendant was honestly and reasonably mistaken and therefore not guilty. See Boyd v. State (1991), Ind., 564 N.E.2d 519, 522 (holding that the evidence of mistake of fact produced at trial did not provide the requisite predicate for any instruction on the issue of mistake of fact because it did not support a finding that the mistake was reasonable).

imminent threat of force," Record at 1262, and Final Instruction No. 21, which articulates the elements of deviate sexual conduct in the same way. It also gave Final Instruction No. 18, which defines the terms intentionally and knowingly. Id. at 1261. These instructions properly instructed the jury regarding the culpability required for the offenses with which Tyson was charged, and properly focused the jury on the task of determining whether the State proved beyond a reasonable doubt that Tyson knowingly or intentionally used force to have sexual conduct with D.W. when D.W. was compelled by the force. The trial court did not err in refusing Tyson's Tendered Instructions Nos. 5 and 6.

VII.

Tyson argues the trial court erroneously excluded his Tendered Final Instruction No. 1, which reads:

> While the jury is the judge of the facts, I am the judge of the law. You must accept my instructions as to the law that governs this case, and then apply that law to the facts as you find them.

Record at 1231. The instruction was properly excluded.

Tyson frames this issue as:

> The court then refused to give an instruction proffered by the defense that would have properly informed the jury of its role under Indiana law: "you must accept my instructions as to the law that governs this case, and then apply that law to the facts as you find them." (R.1231) Refusal to give this instruction was error.

Appellant's Brief at 59. Throughout his argument, Tyson discusses the omitted instruction as if it were tendered without the first sentence; in fact, the first sentence does not appear anywhere in either Tyson's initial brief or his reply brief.[28]

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[28] Thus, Tyson's argument that it was error to refuse to instruct the jury that "you must accept my instructions as to the law that governs this case, and then apply that law to

Tyson's argument is therefore not related to the instruction as it was tendered and refused, and he fails to present an issue in this regard for our review. See Ind. Appellate Rule 8.3(A)(7) ("When error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto."); Taylor v. State (1992), Ind., 587 N.E.2d 1293, 1303; Norris v. State (1986), Ind., 498 N.E.2d 1203, 1206.[29]

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the facts as you find them" is untenable; such an instruction was never tendered to the trial court. See Beasley v. State (1983), Ind., 445 N.E.2d 1372, 1374-75 (A trial court has no duty to revise a tendered instruction so that it may properly be given.).

[29] Tyson's appellate counsel demonstrated his awareness of the requirements of Ind.Appellate Rule 8.3(A)(7) in his brief. See Appellant's brief at 17 n.16 ("The text of the tendered and given instructions [relevant to Issue II] are set out verbatim in the Argument. See infra,

We will, however, as did the court in Taylor, examine the argument as presented.

As stated supra, when reviewing the refusal of a tendered instruction, we must determine whether the instruction correctly states the law, whether the record supports the giving of the instruction, and whether the substance of the excluded instruction is covered by the instructions which were given. Taylor, 587 N.E.2d at 1303. The instruction at issue here is not a correct statement of Indiana law, as its first sentence directly conflicts with Indiana Constitution art. 1, § 19, which provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." A trial court may properly reject an instruction which, in whole or in part,

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Issue II, as required by Ind. Appellate Rule 8.3(A)(7).").

incorrectly states the law. Jones v. State (1983), Ind., 445 N.E.2d 92, 93.

Further, the instructions which were given by the trial court properly explain the role of the jury. In its preliminary instructions, the court instructed the jury:

> You are also the finders of the law that applies to this case, being guided by the instructions given by the judge. You should, however, find both the law and the facts as they are and not as you would like them to be. The instructions of the Court are your best source in determining what the law is.

Record at 5518. The court's final instructions ended with the charge:

> Thus, you are oathbound to find the facts honestly and accept the law faithfully as both exist, and you should return that verdict which you find just and proper under the law as given to you in these instructions and the evidence duly presented during trial.

Id. at 5536. These instructions correctly and unambiguously define the role of the jury under the Indiana

constitution. They properly instruct the jury that the court's instructions are the source for the jury's determination and application of the law, and they do not permit the jury "'to make, repeal, disregard, or ignore the law as it exists.'" Armstead v. State (1989), Ind., 538 N.E.2d 943, 946 (quoting Johnson v. State (1988), Ind., 518 N.E.2d 1073, 1076).[30] The trial court properly rejected Tyson's tendered instruction, which incorrectly states the law, in favor of instructions which clearly and accurately describe the role of the

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[30] Tyson cites Johnson for the proposition that "the jury should be instructed unequivocally that its power to determine the law does not carry with it any 'right to make, repeal, disregard or ignore the law as it exists.'" Appellant's Brief at 59. Johnson holds that an instruction containing this language correctly states the law. The language used by the court here, that the jury must "find both the law and the facts as they are and not as you would like them to be" is an equally correct expression of the law.

jury under Indiana law.

VIII.

Tyson argues that he was denied due process because the prosecutor was able to select the trial judge who would preside over his case. The current system of assigning criminal cases to particular divisions in Marion County erroneously permits the prosecutor to determine the particular room within the criminal division to which a case is assigned. However, because Tyson has failed to show that he was prejudiced in any way by the selection of the particular room, he was not deprived of his due process rights.

On July 29, 1991, the Marion County prosecutor filed a petition requesting that a special grand jury be convened to investigate D.W.'s allegations against Tyson. Pursuant to IC 35-24-2-14 (1988), the prosecutor

could file this petition with any judge in Marion County; he chose to file it with Judge Gifford, who was presiding in Room 4 of the criminal division. On September 9, 1991, the special grand jury returned a true bill indicting Tyson. By local rule an indictment is filed in the room which impaneled the grand jury. Record at 5673. Therefore, the true bill indicting Tyson was filed in Room 4, with Judge Gifford presiding. In this way, the prosecutor selected the particular room and, in the absence of a valid motion for change of judge, selected Judge Gifford as the presiding judge.[31]

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[31] The trial court found that "I don't believe that there's been any evidence submitted to show that there was any reason that it was used to come to this court in deference to any other court. Therefore the presumption would be that it was done on a random basis." Record at 5691. Tyson "does not concede that the prosecutor's motive in this case was anything but strategic," but argues that due process is violated by the judge selection process itself, regardless of the prosecutor's motives

"Before an appellant is entitled to a reversal, he must affirmatively show that there was error prejudicial to his substantial rights." Sharp v. State (1989), Ind., 534 N.E.2d 708, 714 (citation omitted), cert. denied, 494 U.S. 1031 (1990). Thus, error alone is not enough to establish a violation of Tyson's right to due process; Tyson must also show that he was, in fact, denied a "fair trial before an impartial judge." See Harrington v. State (1992), Ind., 584 N.E.2d 558, 561. The law presumes that a judge is unbiased and unprejudiced, Smith v. State (1989), Ind., 535 N.E.2d 1155, 1157, and Tyson has failed to present any evidence to overcome that presumption or to show that he was

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or strategic considerations. Appellant's Brief at 64-65 & n.74.

prejudiced in any other manner.[32] In fact, Tyson expressly stated before trial that he had no reason to doubt Judge Gifford's impartiality, see Record at 360-61 (Tyson's Memorandum in Support of Motion for Random Selection

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[32] In his reply brief, Tyson states:

> The State seems to suggest that the defendant must show that the trial court's rulings unfairly favored the prosecution. Proof on this point can be found in the court's recently-appealed ruling denying defendant's Verified Petition for Post-Conviction Relief . . . . Without even permitting defendant an opportunity to respond to the State's Motion for Summary Disposition of the Petition for Post-Conviction Relief, the trial court adopted the State's untrue and contested factual allegations as its own and then, without any basis, falsely accused the defense of trying "to perpetrate a fraud upon the court."

Appellant's Reply Brief at 35 n.52. This is the only place, throughout both his trial and his appeal, in which Tyson alleges that Judge Gifford was in any way biased against him. An adverse ruling alone is not sufficient to prove bias. Beverly v. State (1989), Ind., 543 N.E.2d 1111, 1115.

of Judge); id. at 5683 (hearing on Motion for Random Selection of Judge), and he apparently did not believe she was biased after trial, either, as he did not seek a change of judge when he filed his petition for post-conviction relief. See Ind.Post-Conviction Rule 1(4)(b) (allowing for change of judge when judge has personal bias or prejudice against petitioner). Tyson has failed to show that the fairness of his trial was in any way affected by the method by which Judge Gifford was selected to preside; therefore, he has failed to demonstrate he was denied due process of law.

However, we strongly urge the criminal division of the Marion County Superior Court to change the method by which cases are assigned to the rooms in the division. The existing system of filing cases is totally inappropriate and must be abandoned in

favor of a system in which the prosecutor cannot control the assignment of a case to a particular judge.[33] Presently, the criminal division of the Marion County Superior Court lacks the appearance of impartiality that is required to maintain the confidence of the public and the accused in the system.

Judgment affirmed.

ROBERTSON, J., CONCURS.

SULLIVAN, J., DISSENTS, WITH SEPARATE OPINION.

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[33] We note that even if the prosecutor had not requested a special grand jury, the system in place currently allows prosecutors to choose which judge will hear a case. Cases are assigned sequentially to the six Marion County criminal division judges in blocks of fifty cases, and it is possible for a prosecutor to find out when cases are being assigned to a certain judge and file his or her information at that time. See Record at 5674-75. This system is no less objectionable than the system by which Tyson's case was assigned.

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IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

MICHAEL G. TYSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No.49A02-9203-
	)	CR-129
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION FOUR
The Honorable Patricia J. Gifford,
Judge
Cause No. 49G04-9109-CF-116245

SULLIVAN, J., DISSENTING

The State opened its oral argument before this Court correctly stating as follows:

> "Before I address what this appeal is all about, I wish to take a moment to address what this appeal is not all about. This appeal is not about reweighing the evidence as the defense would have you do. This appeal is not about reweighing or re-evaluating the credibility of the witnesses as defense would

> have you do. This appeal is not about second-guessing the judgment of Judge Gifford or replacing her judgment with your judgment as the defense would have you do. Rather what this is, is simply a proceeding to determine whether or not Judge Gifford committed such errors of judgment as to warrant the reversing of the conviction of Rape and Deviate Sexual Conduct returned by a Marion County Superior Court jury against Michael Tyson and granting to him a new trial." (Argument by Mr. Reuben, Deputy Attorney General, as transcribed from audio cassette tape.)

It is therefore important to acknowledge and, in making our decision, to emphasize to all concerned parties that this appeal is not about whether Michael Tyson raped D. W. and/or perpetrated two sexual deviate acts upon her. As noted by the State, our decision in this appeal does not, and should not, depend upon whether the evidence was sufficient to permit the jury to reasonably conclude that Michael Tyson committed the three

criminal acts charged. Rather, the issues involve whether the prosecution and the defense were afforded a level playing field upon which to put forth their respective cases. This appeal is quite simply about whether Michael Tyson received a fair trial. He was entitled to nothing more. But most assuredly he was entitled to nothing less. My review of the entire record in the cause leads me to the inescapable conclusion that he did not receive the requisite fairness which is essential to our system of criminal justice.[34]

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[34] In this regard I wish to make it clear that I fully concur in the majority opinion with respect to Issue VII. That issue involves the process by which the judge was selected. We necessarily condemn that process. However, there is absolutely no evidence or permissible inference that Judge Gifford acted in any manner other than with total lack of bias or prejudice. That I believe several of the judge's rulings were erroneous, requiring reversal, in no way dispels my belief that Judge Gifford acted with complete and unswerving judicial integrity and impartiality.

For this reason I dissent. I would reverse all three convictions and would remand for a new trial.

More particularly, I dissent with respect to two major issues: Issue I, dealing with the exclusion of testimony from Ms. Martin, Ms. Lawrence and Ms. Neal; and Issue VI, dealing with refusal of instructions concerning Tyson's belief with respect to whether D.W. consented to the sexual acts involved.[35]

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[35] Because upon a retrial at least one of the other issue involved could recur, I consider it not inappropriate to state my disagreement with a pronouncement by the majority.

With respect to Issue V which concerns the reading of a portion of Justice White's dissent in United State v. Wade (1967) 388 U.S. 218, I agree that the defendant waived the matter because his objection was inadequate. I do not agree, however, that a jury admonition could cure the prejudicial impact of the language read. Reading of the passage on the future by prosecutors, whether during voir dire or opening or closing argument should be condemned in the strongest possible terms. See Bardonner v. State (1992) 4th Dist. Ind.App., 587 N.E.2d 1353,

In dealing with the exclusion of testimony, the trial court exercises considerable discretion. In reviewing the exercise of a trial court's discretion when the trial court has articulated specific reasons for the particular ruling, "we may not attribute to the trial court some other legitimate but unexpressed reason". Palacios v. Kline (1991) 3d Dist. Ind.App., 566 N.E.2d 573, 575. We must focus upon the discretion as it was exercised. We may not, after the fact, create appellate justification for the ruling. Discretionary trial court rulings must be reversed not only when the exercise of discretion is without reason, but also when it is based upon impermissible reasons or considerations. The question is whether the trial court, for the reasons given, properly denied defendant's request to

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trans. denied.

call the three witnesses to testify. City of Elkhart v. Middleton (1976) 265 Ind. 514, 356 N.E.2d 207.

I discern no persuasive rationale which permits a reviewing court to give a criminal trial court much more latitude in making evidentiary rulings than is given to civil trial courts. I agree with the majority's position that deference should be afforded rulings of trial courts. That deference, however, has limits and boundaries. The majority begs the question in perceiving a difference between rulings made after the trial court properly applied applicable legal standards and rulings made after application of incorrect legal standards. It goes without saying that determinative deference is given to a ruling in the former category. Quite simply, a ruling made by correct application of applicable legal standards is a correct ruling and will

be affirmed. It is not a matter of giving deference at all.

The trial court's ruling was based first upon the conclusion that, although not acting in bad faith, the defense nevertheless had substantially breached the discovery order by a delay in notification to the State as to the existence of the witnesses. The second reason given was that to permit the three witnesses to testify would result in prejudice to the State in that several State witnesses, including D.W., had concluded their testimony. The latter rationale was premised, in large measure, upon the State's contention that it would interrupt the flow of the State's presentation and would undoubtedly require recalling some witnesses and obtaining new witnesses, all of whom would testify in an allegedly less effective manner upon

rebuttal.[36]

BREACH OF DISCOVERY AND DELAY

Although there was a time lapse between the receipt of information by Mr. Webb that certain witnesses with relevant information might exist and notification to the State, such "delay" did not and could not have violated the discovery order of the court. The discovery order of December 11, 1991 directed exchange, by December 18, 1991, of lists of all witnesses expected to be called. Clearly, and as noted by the majority, prospective witnesses whose existence was not

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[36] The trial court added that it did "not appreciate being put in this position in the middle of a trial that's taken a great deal of effort, if there is any possibility that it was done with the idea of causing some kind of a reversible error." Record at 4206. Clearly, however, the trial court would not have refused an otherwise valid request to present newly discovered evidence merely because it might affect, in some adverse manner, the substantial effort already put forth by the court.

discovered until January 30, 1992 could not have been listed and disclosed to the State prior to December 18, 1991. The perceived "discovery breach" could then only refer to the "delay" between Thursday evening, January 30, when Mr. Webb received a phone call concerning possible witnesses, and Sunday when the names of the three individuals and the general substance of their anticipated testimony were given to the State.

Defense counsel had a duty to make reasonable investigation before seeking to add witnesses. Furthermore, for defense counsel to prematurely and without investigation advise the prosecution of witnesses who might well provide evidence against the defendant would be a breach of the ethical duty to one's client. Defense counsel is not required to, and may not ethically, assist the prosecution in its collection of evidence, case

preparation, and trial presentation. Not only was there no discovery order breach, there was no delay, substantial or otherwise.

Even if there were some degree of unexplained delay, given the absence of bad faith upon the part of the defense, the State at most would be entitled to a continuance. Boyd v. State (1985) Ind., 485 N.E.2d 126. Failure to request a continuance constitutes a waiver of an alleged discovery breach. Jester v. State (1990) Ind., 551 N.E.2d 840, 842.

The majority correctly observes that there was no necessity to seek a continuance when the trial court had already made its ruling excluding the testimony. The fact that the evidence was excluded, in part because of a discovery breach upon the part of the defendant, does, however, bring the protection of a continuance into play.

The State's clear desire to avoid a continuance destroys the State's argument that exclusion was justified by a discovery breach upon the part of defendant. Such a breach, absent bad faith, calls for a continuance -- not exclusion of the evidence. As held in Patel v. State (1989) Ind., 533 N.E.2d 580, 585: "[E]xclusion of the evidence is appropriate only when the [defense] has blatantly and deliberately refused to comply with the discovery order." Notwithstanding McCullough v. Archbold Ladder Co. (1993) Ind., 605 N.E.2d 175, cited by the majority, Patel has not been overruled.

Not only did the State not seek a continuance, it categorically stated that it did not want a continuance. The State did not want the "flow" of its case interrupted. It offered the view that certain of the witnesses who had concluded their testimony would have to

be recalled and other new witnesses called as rebuttal witnesses and opined that rebuttal evidence is generically less effective and given less weight than testimony during the case in chief. I believe such speculative conclusion is wholly erroneous, particularly because the State could clearly explain to the jury the reason why the rebuttal was necessary. Furthermore, the fear of the prosecution was wholly unjustified in light of the remote and unlikely possibility that the jury, for reasons solely related to the order of presentation, would erroneously diminish the weight to be given the testimony. The jury was clearly instructed that they should seek to indulge the theory

> "that every witness is telling the truth . . . that [they] should not disregard the testimony of any witness without a reason and without careful consideration . . .

> [that] the number of witnesses who testify to a particular fact, or the quantity of evidence on a particular point need not control [their] determination of the truth . . . [and that they] should give the greatest weight to that evidence which convinces [them] most strongly of its truthfulness." Record at 1117.

In any event, the arguable inconvenience to the prosecution does not justify preventing the defense from presenting relevant evidence which might have tipped the balance in light of the reasonable doubt standard governing the jury.

The State's position with respect to the prejudice to its presentation of evidence becomes somewhat schizophrenic, and most certainly inconsistent. On the one hand, the State attempts to diminish the importance of the testimony of the three witnesses by asserting that it would have had minimal impact upon the

issues and was meaningless as merely cumulative. On the other hand, the State has acknowledged that the excluded testimony might have grave implications for a successful prosecution. It so indicated by emphasizing the great lengths to which the State would have to go to combat this testimony. It is clear that the State did not think the evidence to be merely cumulative. The State was very concerned "given the impact of these witnesses on this case, given the notoriety of this case, given what this case is all about . . . . These witnesses clearly would have been telling a story wholly different than the story we had." (Argument by Mr. Reuben, Deputy Attorney General as transcribed from audio cassette tape.)

As earlier noted, we are restricted in validating the ruling of the trial court to the reasons she

gave. The trial court did not base its exclusion of the testimony upon a determination that the proffered evidence would merely be cumulative. The majority here, however, utilizes a conclusion to that effect to affirm the ruling. In doing so it errs. It is appropriate to consider that issue, however, in terms of harmless error and I will do so. The question is whether the exclusion was harmless beyond a reasonable doubt.

The question as to whether evidence is merely cumulative is normally found in cases in which a new trial is sought for newly discovered evidence. Certainly, if, following judgment, evidence is newly discovered which is not merely cumulative and is of such character as to call for a new trial, evidence of the same character should even more readily be admitted if discovered during trial. When the newly

discovered evidence is advanced in sufficient time to permit the opposing party an opportunity to prepare adequate cross-examination or produce contrary witnesses, it should not be excluded. The trial court's erroneous ruling here has given rise to the necessity for a new trial. That drastic but necessary step could have been averted by permitting the three witnesses to be called and to testify.

It is my view that the majority erroneously or inadvertently uses the term "cumulative" interchangeably with the term "corroborative". Cumulative evidence is that which goes to prove what has already been established by other evidence. Davis v. State (1983) Ind., 456 N.E.2d 405; Newell v. Walker (1985) 2d Dist. Ind.App., 478 N.E.2d 1246. It is evidence "of the same kind, to the same point." Union Central Life Insurance Co. v. Loughmiller (1903) 33

Ind.App. 309, 314, 69 N.E. 264, 266. Corroborative evidence tends to corroborate or to confirm while cumulative evidence merely augments or tends to prove what has already been proved. State v. Kennedy (1979) 122 Ariz.App. 22, 592 P.2d 1288. The distinction has been synthesized as follows:

> "Cumulative evidence is additional evidence to support the same point, and which is of the same character with evidence already produced. . . . Though on the same point it may yet not be cumulative, but, if of the same kind, it is cumulative. . . . If it is of a different kind, though upon the same issue, or of the same kind upon a different issue, it is not cumulative. . . . Evidence which brings to life some new and independent truth of a different character, although it tends to prove the same proposition or ground of claim before insisted on, is not cumulative, within the true meaning of the rule. . . . The fact that newly discovered evidence may tend to prove the same issues upon which proof was offered at trial does not necessarily

> make it cumulative, and whether or not it is cumulative is to be determined from its kind and character, rather than from its effect." 10A Words and Phrases, Cumulative Evidence 406-07 (1968) (citations omitted).

The testimony sought to be admitted here was different in kind and character from other evidence adduced at trial. It went to an issue or issues and to facts or observations not covered by other evidence. It was not cumulative. It may have been in the nature of corroboration with respect to the crucial facts surrounding and immediately preceding the sexual acts but that very aspect of corroboration is what made the exclusion of the evidence prejudicial to the defense.

One federal commentator, citing Gordon v. United States (1953) 344 U.S. 414, 73 S.Ct. 369, has stated that reversal will lie "[w]hen the record appears to show that the excluded

evidence would have been more persuasive than, or would have afforded needed corroboration to, evidence already in the record." 3 Orfield's Criminal Procedure Under the Federal Rules §26.342 (1986).

In Shepard v. State (1983) 1st Dist. Ind. App., 451 N.E.2d 1118, trans. denied, Judge Robertson, speaking for the court and joined by Judges Shields and Buchanan, reversed a conviction for excluding evidence of threats made to the defendant who was claiming self-defense. The court, apropos of the case before us, reversed because: "When a defendant claims that he acted in self-defense, evidence legitimately tending to support his theory is admissible . . . [and because] these threats are relevant to Shepard's defense and his claim of having a good faith belief of great bodily harm." 451 N.E.2d at 1120.

United States v. Peak (1988) 7th Cir., 856 F.2d 825, cert. denied, 488 U.S. 969, 109 S.Ct. 499, is to the same effect and is also persuasive. There, the court reversed a conviction for exclusion of evidence which would have reflected the defendant's state of mind and which bore upon his intent, or lack thereof, to possess and distribute drugs. The court also, interestingly, instructed the trial court upon remand that it "should reevaluate its refusal to give the jury an instruction on [defendant's] theory of defense". 856 F.2d at 836.

The only other witnesses to the events upon which the proffered testimony focused were D.W. and Tyson. Those two witnesses could certainly not be classified as disinterested witnesses. The testimony of an objective witness is not of the same character as evidence from a

prosecuting witness or the defendant himself, or from others with a direct personal stake in the outcome. In Newell v. Walker, supra, we ordered a new trial for newly discovered evidence which was comprised of testimony of "the only disinterested person to witness events crucial to the case . . ." 478 N.E.2d at 1251. See also Harris v. Jay (1930) 92 Ind.App. 543, 174 N.E. 107; State v. Evans (1920) Or., 192 P. 1062, 1065. Shumaker v. State (1988) Ind., 523 N.E.2d 1381, relied upon by the majority, is inapposite. In Shumaker, the defendant himself characterized the excluded evidence as having only a "slight tendency" to establish defendant's non-violent nature. Furthermore, the excluded witness was not wholly disinterested, having been a bowling partner of the defendant and the victim for some five years, and her testimony would have

merely duplicated other testimony as to defendant's character.

One aspect of the majority opinion considers the excluded evidence as merely impeaching in nature and holds that it was merely cumulative of evidence which impeached D.W. "on other points". Slip Opinion at 18-19. I strongly disagree. Even if the offered evidence were to be construed solely as impeaching, impeachment upon one issue is not cumulative of impeachment upon other issues. To so hold is to say that impeachment with regard to an essential issue of the litigation is merely cumulative to evidence which impeaches as to a minor collateral matter.

The evidence of record, to which the excluded evidence is thought by the majority to be cumulative, demonstrates that the jury was entitled to believe that there was consensual sexual contact in the hotel room. There was

testimony to that effect from Reverend Katherine Newlin, who attended D.W. at the hospital. Record at 4398 (as quoted by majority in footnote 11). At a very minimum, such testimony gives rise to a strong and reasonable inference of consensual sexual contact in the hotel room. It is baffling indeed, therefore, that the majority proceeds to cavalierly discount the defendant's reasonable belief contention.

The manner in which Tyson and D.W. acted toward each other shortly before the acts complained of has great relevance to whether or not Tyson, at the time, might have reasonably believed, from all the surrounding circumstances and events, that D.W. was consenting -- even though as a factual matter she did not consent. The majority concedes that a reasonable jury might reasonably believe that Tyson had a reasonable belief that D.W.

would consent. Under the circumstances, this conclusion permits a corollary conclusion that the belief continued during the sexual acts. The issue is not whether Tyson reasonably believed that D.W. would consent. It is whether he reasonably believed that she was consenting. In this sense, then, the exclusion of the testimony from Martin, Neal and Lawrence was particularly prejudicial and that prejudice was magnified by the failure to give instructions with respect to mistake of fact, reasonable belief or to instruct that the degree of culpability, i.e., knowing, was applicable to the essential element of compelling force.

In holding that the evidence excluded was "only minimally corroborative of Tyson's testimony" with respect to D.W.'s receptiveness to Tyson's physical advances, the majority usurps the jury function. It is totally

inappropriate for this court to convert speculation as to the credit and weight which a jury would give certain evidence or the impact of such evidence upon their consideration of other evidence into a holding as a matter of law.

Without question there was error in excluding the testimony of Ms. Martin, Ms. Neal and Ms. Lawrence. Without question that error was not harmless beyond a reasonable doubt.

MISTAKE OF FACT AND REASONABLE BELIEF INSTRUCTIONS

Instructions Nos. 5 and 6 tendered by the defense were erroneously and prejudicially refused by the trial court. Instruction No. 5 concerned application of the culpability requirement of "knowingly" to the act of coercive force and whether Tyson could have reasonably believed that D.W. had consented. Instruction No. 6 dealt with mistake of fact as to

whether D. W. had consented.

Consent or the lack thereof is a fact. D.W. either consented or she did not. If she consented, that is a fact. If she did not consent, that is a fact. Resolution of this is a fact question, however, does not end the inquiry. The law provides that if a person accused of rape is reasonably mistaken as to the fact of consent when the alleged victim, in fact, did not consent, such mistake negates the culpability required for the crime. The "reasonable belief" principle, though similar, is not synonymous with mistake of fact. The difference was explained in People v. Rhoades (1987) 193 Cal.App.3d 1362, 238 Cal.Rptr. 909, 913:

> "'Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of the two witnesses is telling the truth.' The defense of a reasonable belief in consent by contrast, 'permits the jury to conclude that both the victim and the accused

> are telling the truth. [Citation omitted.] The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not.'" [Quoting People v. Romero (1985) 171 Cal.App.3d 1149, 1155-56, 215 Cal.Rptr. 634.]

However, in the context of the case before us, the concepts are so closely related as to be equated. See People v. Burnham (1986) 176 Cal.App.3d 1134, 222 Cal.Rptr. 630 (mistake of fact instruction equated with an instruction which directs the jury to acquit if the jury entertains reasonable doubt as to whether defendant reasonably and in good faith believed that the victim freely consented).

Whether a defendant's mistake or belief is reasonable depends upon the attendant circumstances. In the case before us, those relevant and crucial circumstances are not restricted to the occurrences in the hotel room beginning with the point at which Tyson "undress[ed]" D.W. Slip Opinion at 36. They include other circumstances of the day and night preceding the encounter and the activities of the early morning hours which led to the occurrences which transpired in Tyson's hotel room. In this regard, as earlier noted, the excluded testimony of Ms. Martin, Ms. Neal and Ms. Lawrence would have added to the factual mix before the jury and may have reasonably tipped the deliberative balance in favor of acquittal.

The evidence quoted and analyzed by the majority (see Slip Opinion at 36, et seq.), when taken together with

the surrounding circumstances, permit a reasonable belief as to the fact of consent. Stated conversely, if the jury believed that Tyson used only such "force" as would be involved in a consensual sexual act, they may well have concluded that Tyson reasonably believed that D.W. was consenting. Regardless of whether D.W.'s subjective mental state reflected actual consent, and even if as a fact she did not consent, Tyson may have reasonably believed that she was consenting. That question is peculiarly within the prerogative of the jury. They were not permitted to exercise this prerogative, not only because they were precluded from hearing three relevant witnesses, but because they were not advised of the appropriate legal principles which would constitute the essential framework within which to assess the evidence and to consider the relevant

attendant circumstances. In short, by refusing to give defendant's tendered instructions, the trial court denied the jury the proper tools necessary for performance of their duty. They were effectively forced, in this regard, to make factual determinations in a vacuum.

It is improper to deny a reasonable belief instruction, as does the majority here, based upon an evaluation of the weight of the evidence or the credibility of the witnesses. Refusal to give the instruction upon grounds that no reasonable person would have interpreted the evidence to indicate the victim's consent impermissibly invades the jury's province. As stated in People v. Burnnam, supra, 222 Cal.Rptr. at 637:

> "The . . . contention that we should declare, as a matter of law, the appellant's assertions [as to reasonable

> belief] are unreasonable is, in reality, a request that we declare the appellant's assertions to be incredible as a matter of law. The fact that the evidence may be incredible, or is not of a character to inspire belief, does not authorize the refusal of an instruction based thereon, for that is a question within the exclusive province of the jury.

Thus it is not true that when a defendant gives an account evincing the alleged victim's consent, and the victim gives a contrary version, that there is no evidence to support a reasonable belief instruction. Such a view is to say that the fact of consent or non-consent is the be-all, end-all of the issue. It is to hold that mistake of fact or reasonable belief does not exist in Indians law.

In Woods v. State (1992) 1st Dist. Ind.App., 587 N.E.2d 718, trans. denied, the court, speaking through Judge Robertson, upheld the giving of a mistake of fact-reasonable belief

instruction which had been requested by the State. The instruction advised the jury:

> "For the 'mistake of fact' to be a valid defense, the following three elements must be satisfied:
>
> 1. The mistake must be honest and reasonable;
>
> 2. The mistake must be about a matter of fact; and
>
> 3. The mistake serves to negate culpability.
>
> Honesty is a subjective test dealing with what the defendant actually believed. Reasonableness is an objective test inquiring what a reasonable man situated in similar circumstances would do."
>
> 587 N.E.2d at 723.

The instruction was approved because it "clarified the defense" of mistake of fact. Id. In the context of the facts of Woods, the mistake of fact defense could only have been offered with regard to the defendant's belief as to the victim's consent.

While the word "consent" does not appear in I.C. 35-42-4-1, the word "compelled" is used. It is clear,

therefore, that the force or threat of force must have compelling effect upon the alleged victim. The fact of coercion is therefore an indispensable element of the crime. The majority here attempts to divorce the word "force" from the word "compelled" in order to avoid the application of the required degree of culpability. This attempt, in my view, borders upon sophistry. The act upon which the definitions of the crimes focus is sexual intercourse, or deviate conduct by compelling force.

The majority considers the matter of proof of culpability, upon which the prosecution bears the burden, as if it were a part of the "defense" of "mistake of fact" or "reasonable belief". As noted, the coercive aspect of the force used requires proof of culpability. The majority erroneously turns the matter away from proof of culpability, a prosecutorial

requirement, and toward establishment of a defense by the defendant.

The majority seeks to draw a significant distinction between our culpability statute and that of the Model Penal Code. Model Code. § 2.02(4) does not use the word "conduct" in referring to material elements of the offense. This is not, however, particularly meaningful. Again, the prohibited conduct is force which coerces. The fact of coercion is without question a "material element" of the act of "force". Without coercion, there has been no crime of rape or deviate conduct committed. Our statute and our law is wholly consistent with the Model Penal Code.

The fact of coercion is not merely an "attendant circumstance" as was the case in Rose v. State (1982) 2d Dist. Ind.App., 431 N.E.2d 521. It is an essential element of the act itself. In

Rose, defendant shot and killed the victim and was convicted of battery. The "attendant circumstance" involved the victim's conduct, i.e., whether the victim was committing a forcible felony justifying intervention by the defendant. That circumstance is not part of the definition of battery as set forth in the statute. It was therefore not an element of the offense and application of the degree of culpability to it would have been inappropriate.

Similarly, Markley v. State (1981) 2d Dist. Ind.App., 421 N.E.2d 20, involved battery as a Class C felony which requires serious bodily injury as an element. In that setting, the element is a clear result of the prohibited conduct. In essence, the statute prohibits the act of touching in a rude, insolent or angry manner and, as the holding in Markley points

out, the result, although an element of the crime, merely "increases the penalty for the offense committed without proof of any culpability separate from the culpability required for the conduct elements of the offense." 421 N.E.2d at 21.

The rape and deviate conduct statutes clearly differ from the battery statute in this respect. Again, in the former statutes, the "result" element is an integral part of the prohibited conduct element. It is not mere force which is prohibited. It is coercive force.

The concept of victim impact as an element of the prohibited conduct is very much a part of Indiana criminal law. A person commits theft under I.C. 35-43-4-1(4) if he exercises unauthorized control over the property of another by creating a false impression in the other person or under

subsection (5) by failing to correct a false impression that the defendant knows is influencing the other person. Thus under subsection (4) we look to the victim's state of mind as to whether the false impression did in fact exist and whether the impression was otherwise than what the true facts disclosed. Under subsection (5) the culpability of the defendant is tied directly to the effect of the defendant's conduct and its subjective impact and influence upon the victim.

More closely related to the case before us is the crime of child molesting. I.C. 35-42-4-3 (e) makes it a defense if the defendant reasonably believed that the child was over the age of sixteen. Thus, although as a fact the child is under the age of sixteen, if the defendant reasonably believes otherwise he has not committed the crime. Neblett v. State (1979) 2d

Dist. Ind. App., 396 N.E.2d 930. A similar situation exists with respect to the crime of rape as it relates to a mentally disabled victim. I.C. 35-42-4-1.

In Garcia v. State (1983) Tex.Cr.App., 661 S.W.2d 96, 97, the court spoke to the matter as follows: "The female's condition, coupled with the male's knowledge of the mental defect or disease, substitutes for lack of consent by the female (Emphasis in original.) The court in examining the record stated that the victim "had all the outward appearances of a normal appearing twenty-six year old female" and that defendant had no reason to know of her mild retardation. Clearly then, the defendant's perception of the situation in many areas of the criminal law is important, particularly with regard to sex crimes such as here involved.

It is argued, and the majority opinion adopts the argument, that the jury's determination that D.W. did not consent carries with it a corollary -- that the same evidence could not support an instruction that a person could reasonably believe that she did consent. This in turn leads to the majority's conclusion that Instructions 5 and 6 were not supported by the evidence and their refusal was not error at all, or that error, if any, was harmless. The reasoning is faulted.

It cannot be emphasized too strongly that the question is not sufficiently of the evidence to convict of rape and deviate conduct. The question in regard to the instructions is, rather, whether Michael Tyson was entitled to have the jury assess that evidence in the light of applicable law.

The assessment of the evidence and the import given to certain portions of the evidence might differ depending upon the instructions given. This is the very purpose of jury instructions. The question then becomes: Would the verdict arguably have been different if the instructions had been given? The answer is: We simply do not know. We cannot say that the failure to give the instructions, particularly in the light of the exclusion of relevant evidence, was harmless beyond a reasonable doubt.

The instructions, if given, might have resulted in the same verdict. But they might not have. The jury, in light of the instructions might have reasonably concluded that while D.W. did not consent, Tyson did have an honest and reasonable belief that she did so. The jury was entitled to make that determination, not the trial court and certainly not this court.

The erroneous rulings herein considered dictate reversal and remand for a new trial.